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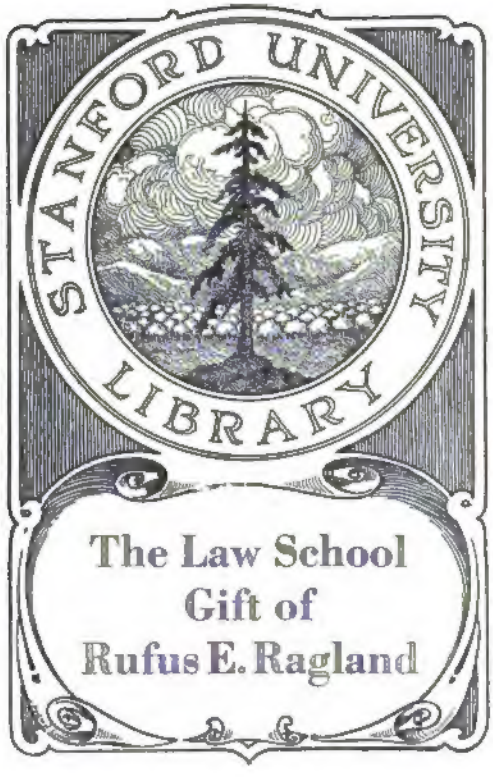
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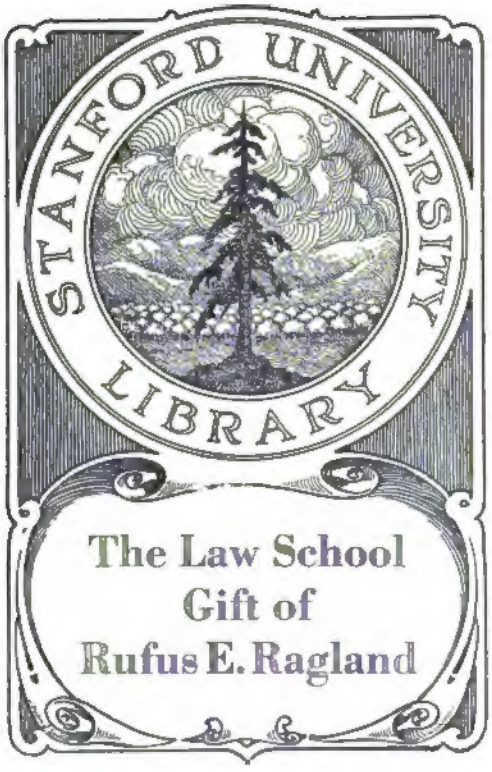
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REPORTS

OF

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ARGUED AND DETERMINED

IN THE

English Courts of Chancery,

WITH

NOTES AND REFERENCES

TO ENGLISH AND AMERICAN DECISIONS.

BY E. FITCH SMITH,

COUNSELLOR AT LAW.

VOL. XXXIV.

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VICE-CHANCELLOR.

BY NICHOLAS SIMONS,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

WITH NOTES AND REFERENCES

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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

TURNER *v.* HILL.

1840: 2d May.

The owner of nearly one-half the shares in a valuable mine in Cornwall, (which was divided into 1,624 shares) having become bankrupt, his assignee and the other shareholders agreed, without the consent of the creditors, to dispose of his shares amongst themselves and their friends; and, in order to effect that object, they arranged that the mine should be sold under a decree of the Vice-Warden of the Stannaries, in an amicable suit to be instituted by a creditor of the mine against the then shareholders; that the mine should be repurchased by the assignee at a certain sum, and that a new company should be formed, consisting of the old and new shareholders. The bankrupt's shares were disposed of accordingly, the assignee and the old shareholders agreed to take some of them, H. and T. to take another jointly; and certain other persons, the remainder. Afterwards it was agreed that the shares in the mine should be altered to 54 shares. The decree was then obtained, and the mine sold and repurchased as had been arranged. H. and T. then agreed to sever their share. The creditors having discovered the circumstances under which the bankrupt's shares had been disposed of, the assignee was removed, and the plaintiff appointed in his place. The plaintiff filed a bill against H. alone, alleging that H. and all the other shareholders had notice of the circumstances before mentioned, and praying that H. might transfer her share to him, and account for and pay to him the profits thereof, and that a receiver might be appointed of the profits of the mine. Held that "the profits of the mine," must be taken to mean the profits of the share sought to be recovered; and that none of the other shareholders were necessary parties to the bill.

THE plaintiff was the surviving assignee of Thomas and John Gundry, bankrupts. The object of the bill was to recover a share in certain mines, in Cornwall, *formerly belonging to the bankrupts, which had been purchased by [*2]

Jane Penneck Hill, and bequeathed by her to the defendants; one of whom was her executrix.

At and before the bankruptcy of the Messrs. Gundry, the mines in question were divided into 1,624 shares; and those gentlemen were entitled, between them, to nearly one-half of the shares. John Gundry was also the purser of the mines; and he having become greatly embarrassed in his circumstances, and the other shareholders having discovered that he had falsely charged them, in his accounts, with sums, to a large amount, as paid by him for materials for the mines, they, a few months before his bankruptcy, dismissed him from his office, and appointed Richard Tyacke purser of the mines in his place. In January, 1820, the commission issued, under which the Messrs. Gundry, who were co-partners as bankers, were declared bankrupts. At the time of their bankruptcy, the mines were very valuable.

H. M. Grylls, a gentleman of great influence in the neighborhood of the mines, became desirous of purchasing some of the bankrupts' shares; and the other shareholders were desirous that he should become a co-adventurer with them in the mines, and should purchase as many of the bankrupts' shares as he should think proper, and that the remainder should be disposed of amongst themselves and such other persons as they should approve of as co-adventurers with them. On the 5th of February, 1820, a meeting of the adventurers in the mines, at which Grylls and Tyacke were present, was held for the purpose of considering how to effect the before-mentioned object; and it was then

[*3] proposed *as the best mode of effecting it, that a new company of adventurers should be formed, and that the bankrupts' shares should be disposed of; and that, for the purpose of securing from liability such persons as should take shares as new adventurers, the mines should be sold through the medium of a decree of the Vice-Warden of the Stannaries, and be repurchased by the old adventurers, and that the moneys to arise from the sale of John Gundry's shares, should be applied in discharge of the debt due from him to his late co-adventurers; and, thereupon, and in the presence of Grylls and Tyacke, the following resolutions were drawn up and signed by the adventurers pre-

sent: "It is proposed, as the only measure which can prevent the mines from stopping, to offer at least one-half for sale, at the price of 500*l.* for each share: it is proposed, for the security of the new adventurers, that the mines, materials, halvans, &c., shall be sold by the decree of the Vice-Warden, and entered upon as on the 1st of this instant February, clear of debts and demands which may have been contracted before that day: that the sum which may be raised from John Gundry's late shares, be wholly appropriated to pay the amount due from the mines to the end of October last: that the present adventurers who shall continue their shares, do give an undertaking, to the Vice-Warden, to pay their proportions of the deficiency which may remain due from John Gundry as late purser, after the proceeds of the said John Gundry's shares shall have been appropriated as above: that communications be made, respecting the purchase of the one-half of the mines agreed to be offered for sale, to Mr. Grylls, and that he be requested to correspond with such persons as are willing to become purchasers thereof; and the adventurers now present, will endeavor *to dispose of some part thereof [*4] amongst their friends, and write to Mr. Grylls the result."

In consequence of these resolutions, Grylls and the then adventurers, together with Tyacke, immediately took active steps to form the new company, and to get persons, whom they approved of, to purchase the shares which were to be disposed of as before mentioned: and some of the old adventurers and Grylls and his friends agreed to take some of those shares; and Jane P. Hill and Tyacke agreed to take another share jointly. The bill alleged that Jane P. Hill, at the time when she so agreed to become interested in the mines, was well acquainted with the several circumstances before mentioned under which the proposed new company was intended to be formed and the said shares therein disposed of; and well knew that the mines were very valuable, and that the proposed undertaking would be very profitable.

On the 16th of February, 1820, at which time all the shares in the new adventure had been disposed of, a meeting of the old and new adventures was held, at which it was resolved that the

principal creditors of the mine should immediately petition the Vice-Warden, for a decree to procure the payment of the sums due to them; that they should represent to him, at the same time, that there was a great number of other creditors, and request him to appoint a day for the proof of their respective claims before his secretary, with a view to a decree for the sale of the mines, materials and halvans, for the purpose of defraying the whole sum which might be due; and that, when that should be accomplished, the Vice-Warden should be petitioned for a decree to sell the mines, with everything which might be thereon, in one lot. On the 23d of the same month, Grylls and Charles Read were chosen assignees of the bankrupts' estates, and [*5] *the usual assignment thereof was made to them: but Read interfered very little in the affairs of the bankrupts, and acted entirely under the influence and direction of Grylls.

Grylls, in order to effect his intention of becoming possessed of part of the bankrupts' shares, and to facilitate the formation of the new company, determined, as soon as he was appointed assignee, absolutely to relinquish the bankrupts' shares; in order that they might be more readily disposed of in the manner and for the purpose mentioned in the resolutions. Accordingly, he and Read, with the privity of and in concert with the old and new adventurers, but without the consent or concurrence of the creditors of the bankrupts, relinquished all the bankrupts' shares to the old adventurers, under the pretence that the debts due in respect to them, exceeded their value.

On the day on which Grylls and Read were appointed assignees, another meeting of the old and new adventurers was held; and they then agreed to take such shares in the new company as were set opposite to their names respectively; and it was further agreed that immediate measures should be taken to induce the Vice-Warden of the Stannaries to grant a decree for the sale of the mines, in order to pay the debts due at the end of January then last; and other arrangements were made with a view to the formation of the new company.

On the 23d of March, 1820, a petition was presented to the Vice-Warden, in pursuance of the before mentioned resolutions,

by Charles Scott and others, against several of the old adventurers, and also against Grylls and *Read as assignees [*6] of the bankrupts' estates, for the pretended purpose of recovering a debt due to the petitioners for goods sold and delivered for the use of the mines, by the orders of John Gundry, whilst he was purser of the mines, and of Tyacke, his successor: but that petition was, in fact, an amicable suit, concerted between the petitioners and the old and new adventurers, in order to obtain a sale of the mines for the purposes before mentioned. On the 9th of May, 1820, the petition was heard, and it was then ordered, with the consent of the adventurers, that the mines and the tin, engines and materials belonging thereto, should be sold, by public auction, under the direction of the secretary of the court, for payment of the debt due to the petitioners. At the time when this decree was made, the engines, materials, tin, &c., belonging to the mines were of the value of 28,000*l.* and upwards: and the bill alleged that a decree for the sale of an entire mine to liquidate one debt, and that of comparatively small amount, was without precedent in the Vice-Warden's court, contrary to the law of the Stannaries, and unnecessary, inasmuch as all the then adventurers, with one or two exceptions, were solvent, and the greater part of them would have been able, if called upon individually, to discharge, immediately, the debt due to the petitioners. On the 2d of June, 1820, a meeting of the adventurers was held, at which it was resolved that Grylls should attend at the sale, which was advertised to take place at the Red Lion, in Truro, on the 5th of June, and should purchase the mines, materials, &c., for 18,000*l.* But, previously to that meeting, it had been agreed that the shares in the mines should be altered, and that they should be divided into 54 shares only, 30 of which the new adventurers agreed to take.

*The sale was commenced on the day appointed; but, [*7] in consequence of some disagreement, or pretended disagreement between Grylls and one of the old adventurers, the Vice-Warden's secretary declined to proceed with the sale; and some of the persons who had attended it, went home. On the evening of the same day, the secretary, Grylls, and some of the old adven-

turers dined together; and it was then arranged that the sale should take place at the Prince's Court, (where the Vice-Warden's court was usually held,) and before the sitting of the court on the following morning. The sale took place accordingly, but without any further notice or advertisement; and Grylls, who was the only bidder, purchased the mines, engines, materials, &c., for 18,000*l.* On the same morning an order confirming the sale, was made by the Vice-Warden, with consent.

The bill, after stating as above, alleged that the shares taken by the new adventurers in the mines, were the shares or part of the shares of the bankrupts so relinquished by Grylls and Read as before mentioned: that the relinquishment, and sale and purchase of the shares of the bankrupts were void in equity; and that the persons who became purchasers of and interested in such shares, were trustees thereof for the creditors of the bankrupts: that, in October, 1821, John Rogers, one of the new adventurers, who had taken the 54th shares in the mines, relinquished his shares, and, thereby, the shares into which the mines were divided, were increased from 54th to 50th shares; and Tyacke and Jane P. Hill became possessed, jointly, of one 50th share, which was part of the shares and interests of the bankrupts in the mines; that Tyacke and Jane P. Hill afterwards divided their share, and the same was, subsequently, held [*8] by them in severance; and one-half *thereof, being a 100th share, was transferred into Jane P. Hill's name, in the cost-book of the mines, and she, thereby, became the absolute legal owner thereof: that Jane P. Hill died in 1836, having, by her will, bequeathed her share in the mines to two of the defendants, their executors and administrators, in trust for her daughters, the other defendants, their executors and administrators; and, shortly after her decease, such share was transferred, into the names of the defendants, in the cost-book of the mines; and that the defendants were trustees thereof for the creditors of the bankrupts: that the circumstances under which the shares of the bankrupts had been disposed of, did not come to the knowledge of the creditors until March, 1825: that some of the creditors then presented a petition to the Lord Chancellor, stating several

of the facts before mentioned, and praying (amongst other things) that Grylls and Read might be removed from being assignees; that new assignees might be chosen in their place, and that they might be made liable, to the estate of the bankrupts, for the loss occasioned by the relinquishment of the shares: that the petition was heard in July, 1829, when it was ordered, amongst other things, that Grylls and Read should be removed, and that new assignees should be chosen in their place; and Grylls was declared to be a trustee of the shares held by him, for the creditors of the bankrupts :(*a*) that, accordingly, the plaintiff, and two other persons since deceased, were chosen assignees of the bankrupts' estates, and the usual assignment thereof was made to them; and that Grylls had assigned his shares to them, and accounted to them for the profits *thereof. The bill charged that [*9] Grylls became the purchaser of the mines under the circumstances, for the purposes, and in the manner aforesaid, at the time he was assignee as aforesaid; and that Jane P. Hill and the several other persons who became interested in the mines as aforesaid, purchased through the means of Grylls, with full knowledge and notice of all the circumstances and purposes before mentioned; and that Grylls purchased the mines as the agent and on the behalf and for the benefit of those persons, he having been authorized so to do as before mentioned; that Jane P. Hill and the defendants, when they became possessed of the 100th share in the mines, had notice, respectively, that Grylls was assignee of the bankrupts' estates when he purchased the mines, and that such purchase was made in the manner, for the purposes, and under the circumstances before mentioned; and it prayed that the defendants might be declared trustees for the plaintiff, of the 100th share, or of such part thereof as the court should think the plaintiff entitled to, and might be decreed to transfer the same to the plaintiff, and to account for and pay to him the profits made by them therefrom: and that a receiver might be appointed of the profits arising from the said mines;

(*a*) See *Ex parte Badcock, In re Gundry*, Mont. & Macarthur's B. C. 231; and *Ex parte Grylls*, in the same matter, 2 Deac. & Chitty's B. C. 290.

the defendant, Joseph Malachy, was a trustee for the plaintiff, and had retained sufficient to satisfy the plaintiff's demand. If the bill had been filed against one of the parties to whom he had sold the mines, could it have been sustained?

At the time when the Messrs. Gundry, whom the plaintiff represents, became bankrupts, the shares into which the mines were divided, were 1,624th shares. They were afterwards divided into 54th shares; and they are now divided into 50th shares. How can the plaintiff take a 1,624th share, out of a share on the new division? He must get his share out of the entire *corpus*; and, for that purpose, all the parties interested in the mines, must be brought before the court.

Besides, it appears, from the statements in the bill, that the bankrupts held less than half the shares in the mines, and that the new adventurers took, amongst them, thirty 54th shares; and, in consequence of Rogers having relinquished his four shares, the shares of the continuing shareholders have been increased; consequently the new shareholders now hold, [*13] amongst them, a larger proportion *of the mines than the bankrupts were entitled to; and, therefore, there must be something which each of the new shareholders is entitled to retain.

Lastly: it is now twenty years since the transaction complained of in the bill, took place.(*a*) Will the Court interfere after so great a lapse of time?

THE VICE-CHANCELLOR:—If new shares accrue, they must be considered the same as the original shares in respect of which the accruer took place, the increase being to the unlawful owner. If a trustee of a beneficial lease takes a renewal of it, this Court will not allow him to hold the renewed lease for his own benefit.

Mr. *Jacob*, Mr. *Richards*, and Mr. *Follett*, appeared in support of the bill; but

THE VICE-CHANCELLOR, without hearing them, said: I agree

(*a*) The brief with which the reporter was furnished, did not mention the time when the bill was filed.

with Mr. *Knight Bruce*, that it is not very distinctly stated, in the bill, what sort of interest the adventurers had in the mines in question: but, as I understand it, the interest was of this kind, namely, that so long as any parties joined together in working the mines, they were at liberty to work them; and, therefore, it was nothing more than a partnership between the persons engaged, for the time being, in the adventure. It is true that they were at liberty to continue the working of the mines, with either more or fewer co-adventurers; but, so long as they worked *them, the adventure was in the nature of a partnership. [*14] It appears too that Mrs. Hill's interest in the mines was disposed of, by her will, as a chattel interest; for it was given to the trustees, their executors and administrators, in trust for her daughters, for their lives, with a power of appointment, and, in default of appointment, in trust for their executors and administrators: and that seems to be the view which is taken of the interest of the shareholders, from the beginning to the end of the bill. And what the Plaintiff seeks to recover in this case, is not a bodily possession of a portion of the mines, in the sense in which a bodily possession might be required by a tenant in common of land; but, throughout the bill, the matter is treated as a matter of commercial adventure in the working of the mines.

Then it appears that there was a most improper manœuvre put in practice, the effect of which was to give to the assignees, Grylls and Read, the property of the bankrupts. That object was accomplished by means of a complicated scheme, the result of which was that the concern was apparently put an end to, although it has been, virtually, carried on from that time to the present.

Taking then the case to be as it is represented by the bill, my opinion is that this Court will give relief, notwithstanding the lapse of time: for there is an allegation that Mrs. Hill, at the time when she agreed to become interested in the mines, was well acquainted with the circumstances, stated in the bill, under which the new company or adventure was intended to be formed, and the shares therein disposed of: and there is an express charge that she and also the defendants well knew, and had full and

[*15] sufficient notice, *when they respectively became possessed of and interested in the said 100th share in the said mines, that the said H. M. Grylls was such assignee as aforesaid, when he made such purchase of shares in the said mines in manner aforesaid; and that the said purchase was, in fact, made in manner and for the purposes and under the circumstances before in that behalf stated; and then there is another charge that Mrs. Hill and the defendants likewise always well knew and had full and sufficient notice, when and ever since they became, respectively, possessed of the said share in the said mines in manner aforesaid, that the creditors of the said bankrupts, and also the plaintiff, as such assignee as aforesaid, disputed such sale and purchase of the bankrupts' shares, and that such proceedings were being taken to set aside the same in manner aforesaid. It seems to me, therefore, that this is a mere pursuit, by means of a bill in equity, of a portion of the property of the bankrupts, which, by a fraudulent transaction of the assignees, became vested in the testatrix: and, that being so, it is reasonably plain that this is a case in which the Court will relieve, provided no sufficient answer is given to it.

That passage in the prayer of the bill, which asks for a receiver of the profits of the whole mines, is clearly a mistake; for the plaintiff is seeking, by his bill, to recover no more than a 100th share of the mines; and, therefore, in common fairness of construction, that passage ought to be referred to the profits of that share, and not to the profits of the whole mines.

With respect to the objection that all the other shareholders in the mines, ought to have been made parties to the bill,

[*16] it is to be observed that what is *wanted, in this case, is to ascertain what profits have been received by the parties who hold that 100th share; and, for that purpose, it is not necessary to have an account taken of all the profits of the mines.

The bill also prays that the defendants may transfer that 100th share, to the plaintiff; and it seems to me that there is no difficulty in granting that part of the relief; for, as the matter is represented, it comes to this, namely, that, by the means and under

the circumstances stated, the defendants have in them, under the denomination of the 100th share, a portion of that share which originally belonged to the bankrupts.

Therefore the demurrer must be overruled.(*a*)

TURNER *v.* TYACKE.

1840: 2d May.

THE object of the bill in this case was to recover, from the personal representatives of Richard Tyacke, (who was dead) the 100th share in the mines, which the deceased had become possessed of, in the manner and under the circumstances stated in the preceding case; and, the defendants having demurred, on the same grounds as in that case, the demurrer was overruled without argument.(*b*)

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*TURNER *against* BORLASE. [*17]

1840: 2d May.

THE plaintiff, in this case, was the same as in the two preceding cases. The defendants were the members of a company or co-partnership called the Gweek Company. The object of the bill was to recover four shares in the mines, which Richard Tyacke (who had been a member of the company) had purchased on behalf of the company. In other respects, the circumstances of the case were precisely the same as those of the two preceding cases: and, the defendants having demurred on the same grounds, the demurrer was overruled after a short discussion.

(*a*) See the two next cases.

(*b*) See the next case.

The defendants appealed to Lord *Cottenham*, C. The appeal was argued in May, 1840; and, at the conclusion of the argument, his Lordship said, that the bill having been filed within twenty years from the time when the transaction complained of took place, and there being no allegations of acquiescence, the general demurrer, which was founded on the length of time, could not be supported.

On the 17th of November, 1840, his Lordship delivered the following judgment:

The only question in this case is whether the bill is defective for want of parties, there being no ground whatever, for the objection for want of equity. As to parties, the case being complicated, some difficulty arises in rightly comprehending the facts, so far as they are applicable to the point; but, [*18] when understood, I do not think there is much difficulty, due regard being had to the allegations in the bill.

Four objections were made for want of parties: on account, first, of the absence of all the new adventurers in the mines: secondly, of the representatives of Richard Tyacke; thirdly, of the representatives of Charles Trelawney,(*a*) and fourthly, of the trustees of the deed of the 4th November, 1819.(*b*)

The facts, as stated in the bill, so far as they apply to these several points, are as follows: That Thomas and John Gundry were entitled to a half or nearly a half of the shares in the original adventure; and John, having become indebted to the other adventurers, as purser of the mines, assigned some of his shares, to trustees, in trust, by sale or otherwise, to raise money to pay the debt; that the Gundrys having afterwards become bankrupts, an arrangement was agreed upon, between the then assignees and the other adventurers, that the whole of the mines should be sold, the shares of the remaining shareholders being re-purchased by them; and that the shares of the Gundrys should be sold, and the proceeds applied in payment of the debt due to the company; and that the purchasers and the old shareholders should constitute a new company: that this arrangement was carried into effect by

(*a*) One of the new adventurers.

(*b*) The contents of this deed are stated in the subsequent part of the judgment.

means of a decree for the sale of the mines, and of the property belonging to them, in the Vice-Warden's court, at the suit of certain creditors of the mines, who lent their names for that purpose; and that, for the purpose of *facilitating [*19] that object, the then assignees of Messrs. Gundry nominally relinquished the shares of the bankrupts: that it was previously agreed that certain other persons should become the purchasers of such shares, and, amongst others, that Richard Tyacke should have four 54ths, for himself and his co-partners in the Gweek Company: that the trustees of Charles Trelawney were to have other of such shares: that the sale under the decree was nominal and fictitious, the sums and future shareholders having been previously agreed upon: that the Gweek Company so became possessed of four 54th shares, and were so entered in the cost book of the mines: and that such four shares were part of the shares of the Gundrys which had been so relinquished: and that the Gweek Company were the legal owners of such shares, but that they had notice of all the circumstances stated with respect to the manner in which the shares of the Gundrys had been dealt with; and that such company was not, therefore, entitled to hold such shares against the creditors of the Gundrys, represented by the plaintiff, their present assignee. The defendants are the existing partners in the Gweek Company, Richard Tyacke being dead; and the bill prays that such shares may be restored to the estate of the Gundrys, upon such terms as the court may think fit, and for an account of the profits of such shares received by the defendants: and that a receiver may be appointed to receive the profits arising from the said mines: and that all proper accounts may be ordered for effectuating the purposes aforesaid.

This, therefore, is a very distinct statement that the shares sought to be recovered from the Gweek Company, were part of the shares that belonged to the Gundrys, and were possessed, by the Gweek Company, under a sale, impeached as fraudulent.

Upon the case so stated, I think that the other adven- [*20] turers and the purchasers of the other shares, are not only

not necessary parties to this suit, but that they would not have been properly made parties to the bill containing such allegations.

I see no reason for departing from the opinion I expressed upon this subject in the case of *Mare* v. *Malachy*.(*a*)

It was, however, observed that the bill prayed a receiver of the profits arising from the said mines; and, if that must necessarily be intended to mean the general profits from the mines, it would be asking for that which could not be granted in the absence of all the other adventurers; but I do not understand the expression to have that meaning. All the case made, and all the relief asked, relate to the particular shares bought by the Gweek Company, and the profits which they have received therefrom; and I must understand the profits, as to which the receiver is asked, to be the profits before spoken of: which makes the whole consistent, and for which purpose the other adventurers would not be necessary parties.

As to the representatives of Richard Tyacke and Charles Trelawney, those persons are alleged to have been purchasers of other of the shares belonging to the Gundrys, under the same sale, it is true, but by distinct purchases; and, as such, they are not necessary, and would not be proper parties to the suit; and Richard Tyacke being dead, all his interest as a partner in the Gweek Company has merged in that of his surviving partners.

[*21] *It only remains to consider the objection that the trustees of the deed of the 4th of November, 1819, are not parties. The other adventurers in the mines were the *cestuisque trust* of that deed; and the bill alleges subsequent transactions, between the assignees of John Gundry, the author of that deed, and such *cestuisque trust*, by which the objects of that deed were accomplished, namely, the sale of the shares and payment, out of the proceeds, of the debts due from John Gundry; and thus, the bill alleges, that all the legal estate and interest of and in the said several last-mentioned shares, is now legally vested

(*a*) 1 Myl. & Cr. 577.

in the defendants.(a) According to these allegations, the trustees of the deed of 1819, have no estate or interest in these shares.

I am, for these reasons, of opinion that the demurrer for want of parties cannot be supported, and that the order of the Vice-Chancellor must be affirmed with costs.

I have thus minutely stated the grounds on which I have come to this conclusion; because, if the allegations in the bill upon which my judgment on the demurrer necessarily depends, be not according to the facts before me at the hearing, there may appear to be ground for supporting an objection for want of parties; and the opinion which I now express cannot have any bearing upon such a case.

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*Beavan *v.* Carpenter. [*22]

1842: 7th and 12th March.

The Court will not, even before replication, dismiss a bill to perpetuate testimony, for want of prosecution; but will order the plaintiff to reply and examine his witnesses, and procure the examination to be completed by a certain time; and, in default thereof, to pay to the defendant his costs of the suit.

The bill was filed to perpetuate the testimony of witnesses.

More than two months since the answer of one of the defendants was to be deemed sufficient, having elapsed, and the plaintiff not having replied,

Mr. *Wetherell*, for that defendant, moved to dismiss the bill for want of prosecution. He cited 1 Smith's Pract. 365, and Anon.(b)

Mr. *Birkbeck* appeared for the plaintiff.

The Vice-Chancellor said that he never remembered an

(a) The bill in *Turner* v. *Hill* also alleged, with respect to this deed, that it was always treated as, and was a complete nullity, and was never acted upon.

(b) 2 Vez. 497, 498.

order being made to dismiss a bill to perpetuate testimony, for want of prosecution; and that he would have the practice inquired into.

The order made by His Honor, after he had ascertained the practice, was that the plaintiff should file a replication forthwith, and proceed to the examination of his witnesses as prayed by his bill, and procure such examination to be completed on or before a certain day; and that, in default thereof, he should pay, to the defendant, his costs of the suit, to be taxed by the Master in rotation.(*a*)

[*23] *BIGNOLD *v.* AUDLAND.

1840: 4th May.

Where a bill of interpleader is filed by the officer of a company, on behalf of the company, the affidavit annexed, ought to state, not that the plaintiff does not collude, but that, to the best of his knowledge and belief, the company do not collude with the defendants.

Where a bill of interpleader is filed respecting a sum of money on which interest is recoverable, at law, under 3 & 4 Will. 4, c. 42, s. 28, the plaintiff ought to offer, by his bill, to pay the interest.

A. having in his hands a sum of money, which B. and C. claimed adversely to each other, filed a bill, against them, praying that they might interplead respecting the sum. The bill also sought the decision of the Court as to a claim, made by B. to interest on the sum, and raised a question as to the costs of an action which B. had brought to recover the sum. Held that the bill was not sustainable as a bill of interpleader, and that it was multifarious.

THE Norwich Union Life Insurance Society being authorized, by Act of Parliament, to sue in the name of their secretary, the bill in this case was filed by them in the name of their secretary, praying that the defendants might interplead respecting a sum of money for which the life of W. Whitelock, who died in June, 1836, had been insured by the society.

(*a*) See *Wright* v. *Tatham*, ante, Vol. II. p. 459, where the motion to dismiss was made after replication.

1840.—Bignold v. Audland.

The defendants Audland and Moser, who were the executors of Whitelock, demurred to the bill on the following, amongst other grounds: first, because the affidavit annexed to the bill, stated that the plaintiff did not collude with any of the defendants; whereas it ought to have stated that, to the best of the plaintiff's knowledge and belief, the society did not collude with any of the defendants: and, secondly, because, interest on the sum insured being recoverable at law,(*a*) the bill ought
*to have contained an offer, on the part of the society, [*24]
to pay interest on that sum as well as the principle of it.

Mr. *Jacob* and Mr. *Walker* appeared in support of the demurrer; and

Mr. *Anderdon* in support of the bill.

THE VICE-CHANCELLOR said that the affidavit ought to have stated not that the secretary, who was the mere nominal plaintiff, did not collude, but that, to the best of his knowledge and belief, the society, who were the real plaintiffs, did not collude with the defendants: and that he thought that where a party from whom a sum of money was due, sought the protection of a court of equity by filing a bill of interpleader, the court ought to be placed, with respect to its power of giving relief, in the same situation as a court of law; and, therefore, that the bill in this case ought to have contained an offer, on the part of the society, to pay the interest recoverable on the sum insured.

(*a*) By 3 & 4 Will. 4, c. 42, s. 28, it is onacted that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice, to the debtor, that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

1840: 5*th December*.—The bill was afterwards amended, leave having been given by the court for that purpose.

To the facts above stated, it is necessary to add that, prior to the filing of the original bill, Audland and Moser com-
[*25] menced *an action, for the sum insured, against one Noverre, who was the survivor of the three directors who had signed the policy; and that, pending the action, Noverre died intestate and insolvent, and letters of administration had not been taken out to his estate.

The amended bill, to which, as well as to the original bill, Audland and Moser, and J. Ward, (to whom Whitelock had assigned the policy in his lifetime,(*a*) were made defendants, alleged that, though the policy had been signed by Noverre and two other directors, yet the insurance society were liable to pay the sum insured; and that, inasmuch as the society were also bound to indemnify Noverre's estate in respect of all costs and charges incurred in respect of the policy, they were entitled to stand in his place, and to require the defendants to interplead in like manner as he, if living, would have been entitled to: that the society were not liable to pay, nor were Audland and Moser entitled, as they alleged, to recover interest on the sum insured, because the policy was effected before the 3d & 4th W. 4, c. 42, was passed, and the society had made no default in payment of that sum, but had been always ready and willing to pay the same. The amended bill prayed that the defendants might interplead respecting the sum insured, and that the plaintiff might be at liberty to pay it into court; the plaintiff submitting, on behalf of the society, to pay such further sum on account of interest, as the court should direct, and to be answerable for the costs
[*26] which Audland and Moser would have *been entitled to, against Noverre or his estate, if the bill had been filed by him.(*b*)

Audland and Moser demurred to the amended bill, for want

(*a*) See *Ward* v. *Audland*, C. P. Cooper's Rep. 146, and ante, Vol. VIII, p. 571.

(*b*) One of the objections made in arguing the demurrer to the original bill, was, that it did not offer to pay the costs incurred by Audland and Moser, in the action brought by them against Noverre.

of equity, and for multifariousness, and also because Noverre was not represented on the record

Mr. *Jacob* and Mr. *Walker*, in support of the demurrer: Three different questions are raised by this bill. The first is a question of interpleader, that is, to which of the defendants the principal sum due on the policy belongs. The second is, whether the insurance company ought to pay interest on that sum. The third relates to the costs of the action brought, by our clients, against Noverre. We say that we are entitled to be indemnified in respect of those costs: but the other side say that those costs are lost by the abatement of the action. The plaintiff, therefore, seeks to have adverse questions, between him and the defendants, decided in an interpleading suit.

But whatever the nature of the bill may be, it is clearly multifarious; for it raises questions between the plaintiff and the defendants, Audland and Moser, with which the other defendant, Ward, has nothing to do.

Lastly: letters of administration ought to have been taken out to Noverre, and the administrator made a party to the bill. As the bill now stands, it contains *a prayer [*27] of interpleader; but the party to be protected by the interpleader is not before the court. The bill, it is true, alleges that Noverre died insolvent; but that is not a sufficient excuse for the absence of his personal representative; the bill ought to have alleged that he did not leave any assets. He may have died insolvent, and yet have left assets sufficient to pay 19*s.* in the pound, to all parties having claims on his estate.

Mr. *Knight Bruce* and Mr. *Anderdon*, in support of the bill: Although this bill may not be, strictly, a bill of interpleader, yet it is one which is conformable to the principles of this court. Notwithstanding three of the directors, of whom Noverre was the survivor, subscribed the policy, yet, by the express terms of it, the funds of the society were to be answerable, to Whitelock's executors, for the sum insured. The society were not the parties to be sued, but their funds were to be made liable through

the medium of an action against Noverre. In order to make this, strictly, a bill of interpleader, Noverre's representative ought to have filed it; it is, however, strictly within the equitable doctrine of interpleader. The society is left encumbered with a sum of money, in its hands, belonging to other persons, from which it is desirous to discharge itself. Is not the owner of a fund charged with the payment of a sum of money, entitled to come to this court, (the time of payment having arrived,) in order to disencumber himself of the money; particularly where interest is claimed? That he is entitled to do so, there cannot be the slightest doubt: and, that being so, there is an equity in this case, although it may not be, strictly, a case of interpleader.

[*28] *Next, with respect to the objection that Noverre is not represented on this record. The bill alleges that he died insolvent; and that is a sufficient reason for not bringing his representative before the court. *Seddon* v. *Connell*,(*a*). And, moreover, the defendants cannot be prejudiced by the absence of his personal representative.

Lastly, with respect to the question relating to the costs of the action. It is perfectly clear that, where the sole defendant in an action dies before judgment, the action is gone, and no costs can ever be recovered in it.

THE VICE-CHANCELLOR:—The question in this case seems to be, first of all, is this a bill of interpleader or not? Lord Redesdale, in the second edition of his Treatise on Pleading, says: "Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own rights and their several claims, and pray that they may interplead, so that the court may judge to whom the thing belongs, and he may be indemnified." And I observe that the language of the fourth edition of the same

(*a*) Ante, Vol. X. p. 85.

work is identically the same. Sir. J. Leach takes the same view of the subject, in *Mitchell* v. *Hayne*.(*a*) In that case an auctioneer had sold an estate for one of the defendants; and the other defendant, who was the purchaser, *had commenced an action against him for the deposit. The auctioneer then filed a bill of interpleader against the vendor and the purchaser, and prayed for an injunction to restrain the action. Sir. J. Leach made this observation on that case: "Interpleader is where the plaintiff is the holder of a stake, which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants. That is not this case. The plaintiff receives a deposit of 87*l.* 18*s.* 9*d.*, and claims, against both the defendants, to retain 27*l.* 16*s.* 10*d.*, for his commission, and the auction duty. And, by this motion, the plaintiff calls upon the defendants to interplead for the sum of 60*l.* 1*s.* 11*d.*, which he desires to pay into court. But the bill itself states that the action which is threatened by the defendant, the purchaser, is for the whole deposit of 87*l.* 18*s.* 9*d.*, and not for the sum of 60*l.* 1*s.* 11*d.*, only, which is all that the defendant, the vendor, could claim. The plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the defendant, the purchaser; and, if he seeks an injunction, must obtain it, not upon the principle of interpleader, but on an order for time, or upon the answer." So that it is quite clear that, in the opinion of Sir J. Leach, where a plaintiff represents, not merely that he has a sum with respect to which two other persons have adverse rights, but that there is a further question to be litigated, adversely, between himself and one of them, that is not a case of interpleader. [*29]

Now the present plaintiff represents the Norwich Union Insurance Society: and he has filed a bill which, after setting forth the granting, by that society, of a *policy of insurance, for the life of a particular person, and the conflicting claims to the sum insured made by the executors of the [*30]

(*a*) 2 Sim. & Stu. 63.

assured, and by the other defendant to whom he had assigned the policy in his lifetime, goes on to represent that there is a dispute as to whether interest is due, upon the policy, from three months after the death of the assured; which question the plaintiff, by his bill, offers to have divided as between himself and one claimant. So that it is obvious that the plaintiff has an adverse claim in respect of the subject-matter of his bill. Therefore, according to Lord Redesdale's definition, and the judgment of Sir John Leach, he has plainly shown that this is not a case of interpleader: and, if this is not a case of interpleader, the plaintiff has no right to ask, in such a bill, that any question may be decided with respect to any claim that Ward may have; for, with that, the executors of Whitelock have nothing to do.

The bill is also oddly constituted in another respect. It raises a question between the society and the executors in respect of a certain indemnity to which the latter may be entitled with regard to the costs of the action brought against Noverre. But that is a question between the society and the executors; and Ward is in no manner interested in it. Yet the bill has mixed up the claim of Ward with the claim of the executors, and the dispute of the society as to the interest on the policy and the indemnity as to the costs of the action; and, therefore, as the bill is not a bill of interpleader, as I take it not to be, it is clearly multifarious, and the demurrer must be allowed.

[*31] *CAMPBELL *v.* SCOTT.

1842: 8th February.

The defendants published a work containing an original essay on modern English poetry, biographical sketches of 43 modern poets, and selections from their poems, amongst which were six short poems, and parts of longer poems, the copyright whereof belonged to the plaintiff. The selections constituted, altogether, the bulk of the defendant's work; but were alleged to have been introduced into it for the purpose of illustrating the essay. The court restrained the publication of the defendant's work, as being an infringement of the plaintiff's copyright.

1842.—Campbell v. Scott.

THE bill complained that the defendants, Messrs. Scott & Geary, who were booksellers and publishers in London, had published and sold, without the plaintiff's leave, certain poems which the plaintiff had composed, and the copyright of which was vested in him: and it prayed for an account and payment of the profits of the sale, and for an injunction to restrain the further sale of these poems.

The bill, and the plaintiff's affidavit in support of it, stated that the plaintiff had, at various times, composed divers poems, and caused them to be printed, published and sold for his own benefit, and that the entire copyright therein, was, previous to the year 1840, and still remains vested in him; that, in the year 1840, he agreed, with Edward Moxon, of Dover-street, Piccadilly, bookseller and publisher, that he should print and publish a new edition of the plaintiff's works, consisting of such original poems as aforesaid, for the plaintiff's benefit, upon certain terms agreed upon between him and Moxon; but the plaintiff did not, by such terms, sell or assign, or in any way part with his copyright in the poems intended to be comprised in such new edition: that, accordingly, in the year 1840, Moxon printed and published a new edition of the plaintiff's works under the title of "The Poetical Works of Thomas Campbell," and copies of such edition had been constantly on sale to the public, ever since: that Moxon had also, by agreement with the plaintiff, from time to time, printed, published and sold other editions of the plaintiff's *works; and that, previously thereto, other [*32] editions of such works, or of some parts or part of them had been, from time to time, printed, published and sold by divers other persons: that, in January, 1842, the defendants printed and published a work intituled, "Book of the Poets"—"The Modern Poets of the Nineteenth Century," and, in such work, they had, without the leave or license of the plaintiff, printed and published, amongst other things, divers of the said original poems, entire, composed by the plaintiff, and called: "Ye Mariners of England," "Lord Ullin's Daughter," "Glenara," "Song of the Greeks," "The Turkish Lady," and "The Last Man;" and also copious selections from others of such poems:

that several of the plaintiff's poems so printed and published by the defendants, were amongst the most popular and characteristic of his works; and the plaintiff's right and interest to and in the copyright of his said original compositions, and his profits by the sale of the same, were likely to be greatly injured and endangered by the defendants' unauthorized publication.

The defendant Scott, by his affidavit, admitted that he and his partner published the work called "Book of the Poets"—"The Modern Poets of the Nineteenth Century;" and said that it was the second or companion-volume to a work, published by the defendants, intituled, "Book of the Poets"—"Chaucer to Beattie:" that the "Book of the Poets"—"Chaucer to Beattie," consisted of an essay on English poetry from its commencement until the end of the 18th century, with biographical notices of various poets, and selections of pieces, and extracts from their works to illustrate the progress of English poetry, the genius, the language, and the characteristics of each of the series of [*33] 117 *celebrated poets of that period; and that it was embellished with 45 engravings to render it more attractive, in acordance with the taste of the day: that "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," contained a similar essay, biographical notices, selections of pieces, and extracts from 43 of the most distinguished and popular of the poets of the nineteenth century, and embellished to a like extent and precisely in the same manner as the first series of the poets from Chaucer to Beattie: that it had always been the custom of the trade to publish works of a similar nature to the before mentioned works of the defendant and his partner, consisting of a collection of pieces and extracts from various authors, under various well-known titles, amongst others, "Elegant Extracts in Poetry, selected by Vicesimus Knox, D. D.," "Poems for Young Ladies, selected by Dr. Goldsmith," &c. &c.: that, since the bill was filed, the deponent had made inquiry as to the custom of the trade in such cases as that complained of, and had been assured, by one of the oldest and most experienced members, that it had always been considered an admitted right to publish *bona fide* selections from the writings of living authors,

whose works were copyright, and that it had been constantly practiced by various publishers of the greatest respectability; and the deponent therefore insisted that he was legally entitled to make the selections and extracts from the works of the plaintiff, which were contained in "The Book of the Poets"—The Modern Poets of the Nineteenth Century:" that the defendants, wishing to make their work on the poets worthy of the attention of the public, employed a competent person to write the essay and biographical notices, and make the selections from the various authors; and, that the intended work might possess novelty and attraction, the editor was instructed *to [*34] produce, as far as possible, an entirely original selection to illustrate their genius, the progressive change in their language and versification, and the characteristic thoughts and expressions of the individual authors, as well as the progress of English poetry during the respective periods: that the deponent believed that the editor, for that purpose, did not confine himself to any particular edition of the various authors, but used considerable labor in ascertaining all their works, and exercised considerable skill in making his selections; in proof whereof, "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," contained three pieces written by the plaintiff, which were not contained in the edition of the plaintiff's works, especially mentioned in his affidavit, or any of the modern editions of his works, and which pieces were very characteristic, and illustrated the biographical notice relating to the plaintiff, one of them being especially referred to in the biographical notice: that the deponent most positively denied that he or his partner had any intention whatever, in publishing "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," to infringe or injure the plaintiff's copyright in his works; on the contrary, the deponent said he should have considered he had done great injustice to the plaintiff, had he omitted to notice him as one of the most celebrated poets of the nineteenth century, and given specimens of his works: that the deponent positively denied that the plaintiff's right and interest to and in the copyright of his original compositions, and his profits by the sale of

the same, were likely to be greatly injured and endangered by the work of the defendants; for that it was well known that works of a similar nature to that of the defendants, were calculated, by the notice taken of the various authors in the biographical notices and the selections made from their
[*35] *works, to draw the attention of the public to their works, and induce persons to obtain copies of such works, which they would otherwise not have done; in addition to which the edition of the plaintiff's works published in 1840, particularly mentioned in the plaintiff's affidavit, contained three long poems and eighty shorter pieces and songs, containing altogether 6667 lines, and was sold for 9*s.*; and that there were other editions of the plaintiff's works sold for a less price, and, in particular, an edition published by Moxon, which contained the same works of the plaintiff as the edition particularly referred to in the plaintiff's affidavit, which was sold for 2*s.* 6*d.*, whereas "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," was published at one guinea, and contained, besides 24 pages of the original essay, 23 biographical notices of one page each, in very small type, and twenty shorter notices of the authors, 425 pieces and extracts, containing, altogether, about 10,000 lines, out of which there were taken from the plaintiff's works, only the six pieces particularly named in the plaintiff's affidavit, containing 298 lines, three pieces, not contained in the edition of the plaintiff's works particularly mentioned in his affidavit or in the other editions thereinbefore mentioned, containing 71 lines, and six extracts taken from the "Pleasures of Hope," "Gertrude of Wyoming," and "O'Connor's Child," which the deponent said he verily believed and insisted were fair and legitimate extracts, and that he was entitled to make them.

The Plaintiff now moved for an injunction to restrain the defendants from selling or exposing for sale any further copies of the work or volume called "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," or such part or parts thereof as consisted of the plaintiff's original composi-
[*36] tions comprised *between pages 233 and 251, both inclusive, of the said volume, and from printing or publish-

ing the same or any other of the plaintiff's compositions, in any other volume or work, without the plaintiff's leave.

Mr. *Cooper* and Mr. *Colcridge*, in support of the motion:

The defendants have taken, from the plaintiff's work, 733 lines, embracing six entire poems and copious extracts from *The Pleasures of Hope* and other poems composed by the plaintiff. The taking is not denied; but the defence set up is that the case comes within the exception in favor of criticism and fair quotation; or, if not, that no injury has been done to the plaintiff. In order to bring a case within the exception in favor of criticism, the critique must not be colorable. Here criticism was not the paramount or principal object of the work complained of: the principal object was to publish the poems of the plaintiff and of other authors, without paying for them. The work is, in fact, a book of selections, with a short essay at the beginning, and a biographical sketch of each of the authors of the selected poems. The song "Ye Mariners of England," has been published separately; and therefore, it is a book by itself. Can it then be said that an author is not injured by selections being made, wholesale, from his works? If one publisher may take two or three poems, another publisher may take as many, and so on, until the whole work has been pirated. Although the 733 lines which have been taken, may be but a small portion of the plaintiff's work, they may comprise the most striking and attractive parts of it. In *Bramwell* v. *Halcomb*, Lord Cottenham, C., says: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part *of [*37] another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value that is always looked to."(*a*) Besides, if the plaintiff had acquiesced in the defendants' taking a portion of his poems, he would have lost his right to call on this court to interfere against other persons infringing his copyright.(*b*)

(*a*) 3 Myl. & Cr. 738.

(*b*) *Saunders* v. *Smith*, ibid. 711.

Mr. *K. Parker* and Mr. *Glasse*, for the defendants:

The complaint made by the plaintiff, has reference to only one edition of his poems, namely, that published by Moxon in 1840. Three of his poems, that is, "The Dirge of Wallace," "Lines on James the Fourth," and "A Song," which are contained in the defendants' publication, are not contained in the edition of 1840. The defendants' work consists of 790 pages, and only 18 are taken from the plaintiff's work. The selections were not made *animo furandi*, but for the legitimate purpose of illustrating the essay at the beginning of the volume, and the biographical notice of the author. The plaintiff can sustain no injury by the publication of the defendants' work; for it is not a substitute for that work, and it is sold at a much higher price. Indeed, the sale of the plaintiff's work, as appears by the defendants' affidavit, will be promoted by the defendants' publication. *Dodsley* v. *Kinnersley*,(a) *Rundell* v. *Murray*,(b) *Roworth* v. *Wilkes*.(c)

THE VICE-CHANCELLOR:—In this case the legal right is, *prima facie*, quite clear with the plaintiff; because it is not de-
[*38] nied that the *extracts complained of, are taken, literally as they stand, from the plaintiff's work.

Then, is the work complained of anything like an abridgement of the plaintiff's work, or a critique upon it? Some of the poems are given entire; and large extracts are given from other poems: and I cannot think that it can be considered as a book of criticism, when you observe the way in which it is composed. It contains 790 pages, 34 of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century: then, without any particular observation being appended to the particular poems and extracts from poems which follow, there are 758 pages of selections from the works of other authors; and, therefore, I cannot think that the work complained of can, in any sense, be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them,

(a) Amb. 403. (b) Jac. 311.
(c) 1 Camp. N. P. C. 94.

and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of pirated matter, which, in fact, constitutes the value of the volume.[1]

[1] To constitute a piracy of a copyright, it must be shown that either the original work had been substantially copied, or has been so imitated as to be a mere evasion of a copyright. *Emerson* v. *Davis*, 3 Story Rep. 768. The true test of piracy or not, is to ascertain whether the defendant has in fact used the plan, arrangement and illustrations of another, as the model of his own book, with colorable alterations and variations, only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials, and common source of knowledge, open to all men, and the resemblances are either accidental, or arising from the nature of the subject. *Emerson* v. *Davis*, 3 Story Rep. 793. To amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout, but only that there should be an important and valuable portion, which operates injuriously to the copyright secured. Ibid. 768 to 795. To constitute piracy of an original work, it is not necessary that the whole, or the larger part of it should be taken out, but only so much as sensibly diminishes the value of the original work, or substantially to appropriate the labor of the author. *Folsom* v. *Marsh*, 2 Story Rep. 100; *Gray* v. *Russel*, 1 Story Rep. 11. A reviewer may cite largely from the original work, if his design be really and truly to use the passages for the purpose of fair and reasonable criticism. On the other hand, it is clear, that if he thus cites the more important parts of the work, with a view not to criticise, but to supercede the use of the original work, and substitutes the review for it, such a one will be deemed in law a piracy. *Folsom* v. *Marsh*, 2 Story Rep. 106. A wide interval may exist between these two extremes, involving great difficulty where the court is approaching the dividing middle line, which separates the one from the other. A fair and bona fide abridgment of an original work is not a piracy of the copyright of the author. *Dodsley* v. *Kinnersley*, Ambler, 403; *Whittingham* v. *Wooler*, 2 Swanst. Rep. 428; *Tonson* v. *Walker*, 3 Swanst. Rep. 672. What constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. A mere selection, or different arrangement of parts of the original work, so as to bring the whole work into a smaller compass, will not be held to be such an abringment, there must be real and substantial condensation of the materials and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original work. *Tyler* v. *Wilson* 2 Atk. Rep. 141; *Folsom* v. *Marsh* 2 Story Rep. 106, 107. In copyright cases it is often obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only; such cases can be treated in no other way than as studious evasions. In other cases the identity of the two works in substance, and the question

Then it is said that there is no *animus furandi:* but if A. takes the property of B., the *animus furandi* is inferred from the act. Here there is a very distinct taking, and, in my opinion, it has been done in a manner which the law will not permit.

Roworth v. *Wilkes* was a case in which 75 pages of a treatise consisting of 118 pages, were taken and inserted in a [*39] very voluminous work, *The Encyclopædia *Londinensis;* and, although the matter taken formed but a very small proportion of the work into which it was introduced, the jury found for the plaintiff, who was the author of the treatise.

I do not think that it is necessary for me to consider whether the selections in this case are the very cream and essence of all that Mr. Campbell ever wrote; but it is pretty plain that they would not have been inserted in the defendants' work, unless the

of piracy often depends upon a nice balance of the comparative use made in one, of the materials of the other; the nature, extent and value of the materials used; the object of each work and the degree to which each writer may be fairly presumed to have resorted to the same common source of information, or to have exercised the same common diligence in the selection and arrangement of the materials. The question of infringement or not, does not depend upon the quantity taken, for, as Lord Cottenham has justly observed "where it comes to a question of quantity, it must be very vague; one writer might take all the vital parts of another's work, though it might be but a small portion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases, as to quantity." *Bramwell* v. *Halcomb*, 3 Mylne & Craig 737, 738. *Saunders* v. *Smith*, 3 Mylne & Craig R. 711, 736, 737. Mr. Justice Story has said: "patents and copyrights approach nearer than any other class of cases belonging to forensic discussion, to what may be called the metaphysics of the law, where the distinctions are, or at least, may be very subtle and refined, and sometimes almost evanescent. In some cases, what constitutes an infringement of a patented invention, is sufficiently clear and obvious, and stands upon broad and general agreement and differences; but in other cases, the lines approach very near to each other, and sometimes become almost evanescent, or melt into each other." *Folsom* v. *Marsh* 2 Story R. 105, 106. In cases of copyright in some cases a considerable portion of the materials of the original work may be included or so fused into another work, as to be undistinguishable in the sense of the latter, which has other professed and obvious objects, and cannot be fairly treated as a piracy, or they may be inserted as a sort of distinct and Mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, which would be a clear piracy. *Folsom* v. *Marsh*, 2 Story R. 116.

party who selected them thought that they were very attractive in themselves. However, it so happens that, in turning over the pages of the defendants' publication, I find an extract from "The Pleasures of Hope," which is the only part of that poem of which I have a distinct recollection: and I have reason to suppose that is a very striking passage, because it has remained impressed upon my memory for so many years.

Then it is said that, with respect to three of the selected poems, the court ought not to interfere in the present case. I admit that they are not contained in Moxon's edition of the plaintiff's works, published in 1840; but nevertheless there is a general statement, in the bill, that the plaintiff composed them all. And I observe that Mr. Campbell is the sole plaintiff: the bill is not filed by him and Mr. Moxon, or by Mr. Moxon alone, but by Mr. Campbell solely: and I consider that his copyright in those three poems is entitled to protection equally with his copyright in the rest of the matters which unquestionably have been pirated from Moxon's edition and copied into the work complained of.

Then the only question is whether there has been such a *damnum* as will justify the party in applying to the *court; because *injuria* there clearly has been. What [*40] has been done is against the right of the plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and, if the court does clearly see that there has been anything done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction.

It strikes me upon the whole, therefore, that I ought to grant the injunction in this case; and I will put Mr. Campbell, if the other side desire it, to bring such action as he may be advised.

Mr. *K. Parker*:—Your Honor will limit the time for bringing the action.

THE VICE-CHANCELLOR:—I shall do here as I have done in other cases: I shall grant the injunction giving the plaintiff

liberty to bring such action as he may be advised, to establish his legal title, and reserve the further consideration of the motion, and give both parties liberty to apply: then, if the action is not brought within due time, you can apply.

[*41] *DE WITTE *v.* DE WITTE.

1840: 8th May.

Testator bequeathed his residue in trust for his daughter Sarah, and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be, from time to time, a sufficient discharge. Held that the daughter and her children living at the testator's death, were entitled to the residue jointly.

J. CRUTCHLEY, by his will, after making several specific and pecuniary bequests, and, amongst them, a bequest to his daughter, Sarah De Witte, for her life, with remainder to her children, gave the residue of his personal estate to trustees, in trust to sell and dispose thereof, and to stand possessed of the proceeds in trust for the sole, exclusive and peculiar use and benefit of his said daughter, Sarah De Witte, and her children, independent of her husband, and her receipts alone, notwithstanding her coverture, to be, from time to time, a sufficient discharge.

The question was, whether Mrs. De Witte took the residue for her life, with remainder to her children, or whether she and her children took it jointly.

Mr. *Goodeve*, for the children, said that there were several instances, in the preceding part of the will, in which the testator had given express estates for life to Mrs. De Witte and his other daughters, with remainders to their respective children.

Mr. *Bethell* and Mr. *Abraham*, for Mrs. De Witte, relied on *Morse* v. *Morse*,(a) as governing the present case, and said that the interpretation contended for on behalf of the children, was

(a) Ante, Vol. II, p. 485.

not a reasonable one, as it would exclude children born after the testator's death.

Mr. *F. Bayley* appeared for the executors.

THE VICE-CHANCELLOR:—I have looked through the whole of the will, in order *to ascertain what the testator [*42] meant by the words which he has used in disposing of his residuary estate; but there is no reason, apparent on the face of the instrument, why those words should not be taken in their plain and ordinary sense, and have their natural effect given to them.

Declare that Mrs. De Witte and her children living at the testator's death, are entitled to the testator's residuary estate, as joint-tenants, (the interest of Mrs. De Witte being for her separate use,) and that her receipts will be sufficient discharges for all moneys that shall be paid to her during the continuance of the joint-tenancy between her and any of her children.

THE NORTHAM-BRIDGE AND ROAD COMPANY *v.* THE LONDON AND SOUTHAMPTON RAILWAY COMPANY.

1840: 11th and 12th May.

Although a court of equity would have been satisfied if the opinion on a case, or the verdict on an issue directed by it, had been the reverse of what it is; yet it is not the duty of the court to direct another case or another issue, unless it sees that the opinion or the verdict is clearly wrong.

ON the hearing of a motion for an injunction in this case, one question was whether a road called The Northam-Bridge Road, which was crossed by the line of the London and Southampton Railway, was a turnpike road within the meaning of the act for making the railway. The Vice-Chancellor directed a case to be made for the opinion of the Barons of the Exchequer upon the question.

[*43] *The case having been argued, the learned Barons certified in the affirmative.(a)

The motion for the injunction was now renewed. At the same time, the defendants, who were dissatisfied with the certificate, applied that a case might be made for the opinion of another court of law, upon the question.

Mr. *Knight Bruce* and Mr. *Taylor*, for the plaintiffs.

Mr. Sergeant *Wilde*, Mr. *M. D. Hill*, Mr. *Jacob*, and Mr. *Jemmett*, for the defendants.

THE VICE-CHANCELLOR:—A case was sent to the court of Exchequer, in which the question was, whether the Northam Bridge Road, was to be considered as coming within the words, "any turnpike-road," in the Southampton Railway Act. Now a road may be considered as a turnpike-road, either by reason of its being within the intent and meaning of the acts which regulate turnpike-roads in general, or by reason of its being a road upon which there is a turnpike, that is to say, some species of obstruction, to the public, in passing along the road unless they pay toll, which may be applicable, to some extent at least, to the sustentation of the road. It is quite clear, and, indeed, it was not contended that mere private roads, however obstructed, are within the meaning of the act.

The Barons of the Exchequer have certified to me their deliberate opinion that the road in question is a turnpike-road within the meaning of the act, and I am now asked not to accede to that certificate.

[*44] *Where this court has either sent a case for the opinion of a court of law, or directed an issue to be tried by a jury, and a certificate has been returned, or a verdict found, it may easily happen that this court would have been satisfied, if the reverse had been certified in the one case, or found in the other. But I apprehend that it is not a reason for quarrelling with either a certificate or a verdict, merely because the reverse

(a) See 6 Moes. & Wels. 428.

might have been equally right. And I do not think that I can judicially dissent from the certificate in this case, unless I see something in it that is clearly wrong, some plain violation of an acknowledged principle, or something which satisfies me that it cannot be right.

On looking at the Southampton Railway Act, it strikes me that very good reasons may be assigned in support of the conclusion which the Barons of the Exchequer have come to. [His Honor here stated the reasons.] On these grounds I cannot say that I think that the certificate is so wrong that I am judicially bound to dissent from it and send a case to another court of law. On the contrary, my opinion is, that, having now obtained the deliberate opinions of the Barons of the Exchequer upon the question submitted to them, I have the law laid down before me with sufficient clearness to enable me to proceed with the motion; that is, having now ascertained the law, I shall be able to enter into the question of equity: and, according to the best opinion that I can form, I think that I shall not be doing that which will be either wise or useful, or, I may say, consistent with my view of juidcial duty, if I were to send this case to another court of law.

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*Williams *v.* Newton. [*45]

1840: 12th May.

Plaintiff did not proceed, within the time limited by 11 Geo. 4, and 1 Will. 4, c. 36, rule 13, to take the bill *pro confesso* against a defendant who was in prison for want of answer. After that time had expired, the defendant filed his answer, and then moved, under the rule, to be discharged, without costs. Held that, as the defendant had not applied to be discharged until after he had disabled the plaintiff, by filing his answer, from proceeding to take the bill *pro confesso*, the case was not within the rule, and, therefore, the defendant could not be discharged without paying the costs of his contempt.

The defendant being in prison, and in contempt for not

answering the bill in this cause, an attachment was lodged against him on the 3d of December, 1839: and, as he did not put in his answer within two calendar months from that day, the plaintiff might have proceeded, under 11 Geo. 4, and 1 Will. 4, c. 36, rule 13, to take the bill *pro confesso*. He did not, however, take any step for that purpose; and, consequently, at the end of six weeks after the expiration of the two months, the defendant was entitled, under the same rule, to be discharged out of custody without paying any of the costs of the contempt. Some time after the six weeks had expired, the defendant put in his answer; and

Mr. *Blunt*, on his behalf, now moved that he might be discharged out of custody, without payment of costs.

He said that, under the 13th rule, the defendant was entitled, before he put in his answer, to be discharged without costs; for the plaintiff, having omitted to proceed to take the bill *pro confesso* within the six weeks, had forfeited his right to costs.

Mr. *Koe* appeared for the plaintiff; but

THE VICE-CHANCELLOR, without hearing him, said that the defendant would have been entitled to be discharged [*46] without costs, if he had applied after the expiration *of the six weeks, and before he put in his answer; but as he had, by putting in his answer, disabled the plaintiff from proceeding to take the bill *pro confesso*, the case was not provided for by the act, and, therefore, the defendant could not be discharged without paying the costs of his contempt.

TEAGUE *v.* RICHARDS.

1840: 12th May.

Although an order for preliminary accounts and inquiries has been obtained in a suit for administering a testator's estate, yet the court will not, on that account, restrain a creditor from suing the executors at law The order, however, does not prevent the parties from having the cause heard before the Master has made his report.

THIS was a suit for the administration and distribution of a testator's estate.

Under the fifth general order of May, 1839, the plaintiff had obtained an order, dated the 31st of January, 1840, referring it to the Master to take an account of the testator's personal estate, and of his funeral and testamentary expenses, debts and legacies, and to advertise for creditors; and the master had advertised accordingly. In December, 1839, a creditor of the testator brought an action, for his debt, against the defendants, the executors, and was about to proceed to trial, notwithstanding he had been served with notice of the order of January, 1840. Whereupon,

Mr. *Lovat*, for the executors, moved that all further proceedings in the action might be stayed, and that the creditor might be directed to go in and prove his debt before the Master under the order.

Mr. *Girdlestone* appeared for the creditor.

THE VICE-CHANCELLOR:—The interlocutory order which has been obtained in this cause, is not so extensive as the decree which *would have been made at the hearing; for [*47] it contains no direction for payment of the testator's debts, and I am not at liberty to give to it any force or value, except what is derived from the terms of the order itself.

In my opinion, however, the cause may be heard and a decree

made notwithstanding the existence of the order, without waiting for the Master's report.

Motion refused with costs.

HOOPER *v.* BRODRICK.

1840: 27th May.

The lessee of an inn covenanted to use and keep it open as an inn, during the term, and not to do any act whereby the licenses might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant, the lessor obtained an *ex parte* injunction, restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licenses might become forfeited or be refused: But the injunction was afterwards dissolved, the court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same, in effect, as ordering him to keep an inn; and no intention having been shown on the part of the defendant to violate the negative part of the covenant.

THE defendant was the assignee of a lease of the Cross Keys Inn, in St. John's-street, Clerkenwell, which the plaintiff had granted, and which contained a covenant on the part of the lessee, his executors, administrators and assigns, to use and keep open the demised premises, during the term, as an inn, provided the proper licenses for that purpose could be obtained, and to use his best endeavors to procure the licenses to be renewed from time to time, and not to do, or cause or permit to be done, any act whereby they might become forfeited or be refused.

The inn proved to be a losing concern, and the defendant [*48] having threatened to do certain acts inconsistent *with the first branch of the covenant, the plaintiff filed the bill in this cause for, and obtained, *ex parte*, an injunction restraining the defendant from discontinuing, during the term, to use and keep open the premises as an inn, or to renew the licenses, from time to time, provided they could be obtained, and from doing or causing or permitting to be done, any act whereby the licenses might become forfeited or be refused.

1840.—Hooper v. Brodrick.

Mr. *G. Richards* and Mr. *Palmer*, for the defendant, now moved to dissolve the injunction. They said that the court could not order the defendant to perform the positive part of the covenant, which was, to carry on the business of an innkeeper, and, therefore, the injunction could not be sustained. *Blakemore* v. *The Glamorganshire Canal Navigation*,(a) *Earl of Ripon* v. *Hobart*,(b) *Kemble* v. *Kean*,(c) *Kimberley* v. *Jennings*.(d)

Mr. *Knight Bruce* and Mr. *Bazalgette* for the plaintiff. The covenant is not that the defendant or any other particular individual shall carry on the business of an innkeeper; but that the business shall be carried on on the demised premises. An injunction may be granted to prevent the using of a house as a shop, where it would be a breach of covenant; and, if the covenant be that the house shall be used in no other manner than as an inn, the covenantee has a right to have the covenant performed. The defendant, in this case, may get rid of his liability under the covenant, by assigning the lease. Although the court cannot compel the tenant of a house to carry on any particular trade or business in it, it may *prevent him from [*49] using the house for any other purpose. In many cases, the injunction of this court must be mandatory in effect, although it is prohibitory in form. *Morris* v. *Colman*.(e)

The Vice-Chancellor:—The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same, in effect, as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing, or permitting to be done any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises.[1] It is not, however, shown that the defendant has threatened or intends to do, or to cause, or permit to be done

(a) 1 Myl. & Keen, 154
(b) 3 Myl. & Keen, 169.
(c) Ante, Vol. VI. p. 333.
(d) Ibid. 340.
(e) 18 Ves. 437.
[1] See *Dietrichsen* v. *Cabburn*, 2 Phil. 52.

injunction, contended, first, that the injunction was, at the least, too extensive, and that it ought to be confined to those reports alleged to have been copied from "The Jurist," in which the plaintiffs claimed copyright; and, secondly, that the plaintiffs ought, (especially as they claimed copyright in some only of the reports which were the same in both publications,) to have specified in their bill, and also in their affidavit on which the injunction was obtained, the particular reports which they alleged to have been pirated: whereas, in their bill, they had stated merely that many of the reports in "The Legal Observer," had been copied from "The Jurist;" and, in their affidavit, that a book marked B., which contained eighteen numbers of "The Legal Observer," contained copies of reports in a book marked A., which contained several numbers of "The Jurist."

Mr. *Knight Bruce* and Mr. *Sharpe*, for the plaintiffs, said that, in *Lewis* v. *Fullarton*,(a) the pirated work did not wholly consist of original matter, but partly of original matter and partly of selections from other authors; and yet the Master of [*53] the Rolls refused to *confine the injunction to the original matter, and granted it generally; and that, in cases of infringement of copyright, the plaintiff was not required to point out the particular parts of the rival work, which he alleged to have been pirated from his work.

THE VICE-CHANCELLOR:—As long as I remember the court, it never has been thought necessary for a party who complains that his copyright has been infringed, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work; but it has been always considered sufficient to allege, generally, that the defendant's work contains several passages, which have been pirated from the plaintiff's work; and to verify the rival works by affidavit. Then, when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out

(a) 2 Beav. 6.

to the court the passages which they rely upon as showing the piracy.

The injunction, as it is now expressed, does not extend to the reports which have been taken from a common source; but to those only which have been copied from "The Jurist," and which are the plaintiffs' copyright. As it is quite plain that an injury has been done by the defendants, I shall continue the injunction as it now stands, and let the plaintiffs bring such action as they may be advised. I shall not fix any time for bringing the action; but, in order to guard against delay in commencing or proceeding with it, I shall give each party liberty to apply. The defendants must admit that the gentlemen who furnished the reports to "The Jurist," have assigned their copyrights therein to the plaintiffs.

*Mr. *Wigram* asked that the defendants might be allowed to sell those numbers of "The Legal Observer" which were already printed, they keeping an account. [*54]

THE VICE-CHANCELLOR said that he could not grant that permission without the plaintiffs' consent.

Mr. *Knight Bruce* said that they could not consent.

IN THE MATTER OF 11TH GEO. 4, AND 1ST W. 4, C. 60. *Ex Parte* WILLIAMS.

1840: 10th June.

Four co-partners purchased an estate out of the partnership assets, and took a conveyance to themselves as tenants in common in fee. One of them died intestate as to his real estates, leaving an infant heir. The survivors settled, with his executors, for the value of one-fourth of the estate, and then petitioned, under the 11 Geo. 4, and 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join in conveying the estate to a purchaser. The court refused to make the order, and said that a bill must be filed.

FOUR persons, who were co-partners as bankers, purchased a freehold estate out of the assets of the partnership, and had it

conveyed to them and their heirs as tenants in common. Afterwards one of the partners died, intestate as to his freehold estates, leaving an infant heir. The surviving copartners settled accounts with the executors of the deceased, and allowed them, in account, one-fourth of the value of the estate. They then contracted to sell the estate, and presented a petition under the 11th Geo. 4, and 1st Will. 4, c. 60, alleging that the infant was a trustee for them of one-fourth of the estate and praying that he might be ordered to join, with them, in the conveyance to the purchaser.

Mr. *Cockerell*, for the petitioners, suggested that it was doubtful whether the court could direct the usual reference
[*55] *in this case, as the effect of it might be to take away the infant's estate in his absence.

THE VICE-CHANCELLOR declined to make any order under the Act; and said that a suit must be instituted for the purpose of having the infant declared to be a trustee.(*a*)

FRYER *v.* RANKEN.

1840: 12th June.

"I give, to my wife, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease."

Held that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house, and the interest of a sum due on mortgage, did not pass.

THE will of Cornelius Fryer contained the following bequest: "I give and bequeath unto my dear wife, Susannah Fryer, all my ready money at my bankers, in my dwelling-house, or else-

(*a*) See the 18th sect. of the Act.

where: by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand, for current income and expenses, at the time of my decease, subject to the payment, thereout, of the legacy of 50*l.* hereinafter given to Miss M. Wilson, now residing in my house. I also give and bequeath, unto my said dear wife, absolutely, all my plate, jewels, trinkets, seals, watches, porcelain and other china, books, pictures, prints, paintings, household furniture, linen, wearing apparel, stores, wines and other liquors, horses, harness and carriages, *together with my estate and interest in the house [*56] I now occupy, or such other house I may occupy as my usual residence at the time of my decease, and all the effects in and about the same, excepting only securities for money. I give and bequeath, to the said M. Wilson, a legacy of 50*l.* to be paid out of my ready money before mentioned, free of legacy duty or other deductions, as soon as conveniently may be after my decease." And after giving some other pecuniary legacies, the testator bequeathed the residue of his estate, to the defendants, and appointed them and his wife, who was the plaintiff in the cause, the executors and executrix of his will.

The testator, at his decease, had a cash balance in the hands of his bankers; another cash balance in the hands of C. Ranken, his agent and receiver, on whom he was in the habit of drawing as on a banker, and who kept a running account with him; interest due on a mortgage; dividends due on stock; and rent due for a house. Ranken was agent for the mortgagor as well as the testator; and, as the interest on the mortgage became due, he had been in the habit of transferring the amount from time to time from the mortgagor's account to the credit of the testator's account: but, by some accident or oversight, the amount of the half year's interest due at the testator's death, had not been so transferred.

The question was, whether any, and which of the sums above mentioned, passed by the above bequest.

Mr. *Knight Bruce* and Mr. *Pole*, appeared for the plaintiff.

1840.—The Midland Counties Railway Company v. Westcomb.

Mr. *Jacob*, Mr. *Collins* and Mr. *Sawyer* appeared for the residuary legatees.

[*57] *THE VICE-CHANCELLOR held that the balances in the hands of the testator's bankers and of his agent, and the dividends due on the stock, which he might have received on applying for them, passed by the bequest: but that the rent of the house, and the interest on the mortgage, which, at the testator's death had not been transferred to the credit of his account with Ranken, who, therefore, then held it as agent for the mortgagor, did not pass.(a)

THE MIDLAND COUNTIES RAILWAY COMPANY *v.* WESTCOMB.

1840: 19th June.

A. agreed to sell land to a railway company, but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant.

Held that, although the company were bound, by their act, to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit, and of having the conveyance settled by the Master, must be paid out of the purchase-money.

THE defendant's father had agreed to sell a piece of land to the plaintiffs, for the purposes of the act for making the railway; but, before he had executed the conveyance, he died intestate, leaving the defendant his heir.

The defendant, being an infant, the plaintiffs were under the necessity of instituting this suit, in order to obtain a decree directing the infant to convey the piece of land to the plaintiffs: and the court, having decreed accordingly, the question was, whether the costs of the suit were to be paid by the plaintiffs or by the defendant.

(a) See *Vaisey* v. *Reynolds*, 5 Russ. 12.

1840.—The Midland Counties Railway Company v. Westcomb.

Mr. *Hallett*, for the defendant, said that, by the act, the expenses of the conveyance of lands taken by *the [*58] plaintiffs for making the railway, were to be borne by them; and that, in this case, the costs of the suit, were part of the necessary expenses of the conveyance, and, therefore, ought to be paid by the plaintiffs. *Ex parte Cant.*(a)

Mr. *James Parker*, for the plaintiffs, cited *Prytharch* v. *Havard*.(b)

THE VICE-CHANCELLOR:—If the defendant's father, instead of allowing the piece of land to descend to an infant, had taken only the ordinary precaution of devising it either to his executors, or to a trustee in trust to convey it to the plaintiffs, there would have been no occasion for instituting this suit: and as he has created the necessity for the suit, by his own laches, the costs of it must come out of the purchase-money. The expenses of the actual conveyance, must be borne by the company; but, if it is necessary that it should be settled by the Master, the extra expense occasioned thereby, as well as the costs of the suit, must be paid out of the purchase-money.(c)

(a) 10 Ves. 554. (b) Ante, Vol. VI. p. 9.
(c) See *Prytharch* v. *Havard*, ante, Vol. VI. p. 9.

1840.—Seton v. Smith.

[*59] *SETON *v.* SMITH.

1840: 19th June.

An unmarried lady being entitled to 5,000*l.* charged upon a real estate of which she was tenant for life, with remainder to her children in tail, and being entitled also to a sum of stock, for her life, with remainder to her children absolutely, by the settlement on her marriage released the real estate from the 5,000*l.*; and, supposing that the stock was her absolute property, settled it on her husband for life, with remainder to her children. After the marriage, the parties to the settlement having discovered the mistake as to the stock, made an indorsement on the settlement, by which, after reciting that they had so discovered, they declared that, thenceforth, the stock should be held by the original trustees thereof, (in whose name it was still standing,) upon the trusts to which it was subject before and at the date of the settlement.

Held that the children of the marriage could not claim the benefit of the release of the 5,000*l.*, and also the sum of stock, to the prejudice of their father's interest therein under the settlement: but that, before the indorsement was made, he was entitled to put them to their election, and that he had not lost that right, by being a party to the indorsement.

JOSIAS COCKE, by his will dated the 28th of March, 1812, directed the sum of 5,000*l.* to be raised, by mortgage of his real estates, and paid to his wife, in case she should survive him; and he gave his real estates subject to the raising and payment of the 5,000*l.*, and his personal estate, to trustees, in trust for his daughter, Ann Maria Cocke, for her life, and, after her decease, in trust for her children, equally as tenants in common in tail.

The testator died in 1821, leaving his widow and daughter surviving him. His residuary personal estate consisted of 1,000*l.* consols, and 3,500, francs rentes in the French five per cent. stock.

The widow died in 1831, having, by her will, bequeathed the 5,000*l.* to her daughter, Ann Maria Cocke.

[*60] *By the settlement on the marriage of Ann Maria Cocke with Miles Charles Seton, dated the 14th of August, 1832, and made between Ann Maria Cocke, of the first part, William Slater of the second part, Miles Charles Seton of the third part, John Mark and Frederick Smith, William Henry M'Alpine and

Henry Smith, of the fourth part, after reciting that the 5,000*l.* had not been raised, and that it had been agreed that Ann Maria Cocke should release her right to that sum, and that the 1,000*l.* consols, and certain other sums of the same stock then standing in the name of Ann Maria Cocke, making, altogether, 4,247*l.* 4*s.* 6*d.* consols, and the 3,500 francs French stock, should be transferred to certain persons therein named, upon the trusts thereinafter mentioned, and that Ann Maria Cocke had executed powers of attorney for transferring the same accordingly: Ann Maria Cocke released her late father's real estate from the 5,000*l.*, and assigned the consols and French stock to the trustees in trust, in case she should die in the lifetime of Miles C. Seton, and any issue of the marriage should be then living, to pay two third parts of the dividends of those funds to M. C. Seton during his life, if any issue of the marriage should so long live, and, after the decease of Ann Maria Cocke, in trust to stand possessed of the same funds, (subject to the life-interest of M. C. Seton in two third parts thereof,) in trust for the children of the marriage who, being sons, should attain 21, or, being daughters, should attain that age or marry.

Soon after the solemnization of the marriage, it was discovered that the 1,000*l.* consols, and the 3,500 francs French stock, were not, as had been supposed, the property of Ann Maria Cocke at the time of the execution of the settlement, but that the same had *passed, by the will of Josias Cocke, to the [*61] trustees thereof, upon the trusts thereby declared. In consequence of that discovery, an indorsement was made, on the settlement, in the following words:

"Whereas the within mentioned marriage hath been duly had and solemnized; and whereas, at the time of making and executing the within written indenture, it was erroneously supposed that the sum of 1,000*l.* 3*l.* per cent. consolidated bank annuities, one of the sums within mentioned as forming part of the aggregate sum of 4,247*l.* 4*s.* 6*d.* 3*l.* per cent. consolidated bank annuities within mentioned, and also the sum of 3,500 francs rentes, were the property of the within named Ann Maria Cocke; and it is within stated that the said sum of 1,000*l.* 3*l.* per cent. con-

solidated bank annuities, and the said sum of 3,500 francs rentes, had been transferred into the name of the said Ann Maria Cocke, and were, at the time of the execution of the within written indenture, standing in her name accordingly; and whereas, soon after the execution of the within written indenture, it was discovered that the said sums of 1,000*l.* 3*l.* per cent. consolidated bank annuities, and 3,500 francs rentes, were the property of the said Josias Cocke, having been purchased by him in his lifetime, and he having died possessed thereof, and the same, at the time of his decease, were standing in his name in the respective books of the said stocks or funds: and whereas the said two sums of stock were given and bequeathed, by the said Josias Cocke, in and by his will within recited, amongst the general description of his personal estate, property and effects, unto his executors, the within named J. M. F. Smith, and Henshaw Latham, of Dover aforesaid, banker, upon certain trusts therein set forth: and whereas, in *consequence of the said sums of stock having been so discovered to have been the property of the said Josias Cocke, the same were not, as within stated, transferred to the said Ann Maria Cocke, but the same remained in the name of the said Josias Cocke until lately, when the same have been transferred into the names of the said J. M. F. Smith and H. Latham, as such executors as aforesaid: Now it is hereby declared and agreed, by and between the parties to the within written indenture, that the said two sums of 1000*l.* 3*l.* per cent. consolidated bank annuities, and 3,500 francs rentes, shall, from henceforth, continue and be in the names of the said J. M. F. Smith and Henshaw Latham, as executors as aforesaid, and in the name of the survivor of them and his executors and administrators; and that they and the survivors of them, and the executors and administrators of such survivor, shall, from henceforth and at all times hereafter, stand and be possessed thereof and of the interest, dividends and annual proceeds, from time to time to accrue and grow due thereon, upon such trusts, and to and for such ends, intents and purposes as, in and by the said will of the said Josias Cocke, are mentioned, expressed and declared, of and concerning his personal estate and effects, or

[*62]

upon such of the same trusts as are now subsisting and capable of taking effect."

Ann Maria Seton died in November, 1838, leaving her husband, Miles C. Seton, (who became her personal representative,) and three infant children by him, her surviving.

The bill was filed by two of those children, against the third, and also against J. M. F. Smith, Henshaw Latham, Miles Charles Seton, W. H. M'Alpine and *Henry West, alleg- [*63] ing that, under the will of Josias Cocke, the plaintiffs and the defendant, their brother, who was Josias Cocke's heir, were entitled to J. Cocke's real estate as tenants in common in tail, with cross remainders between them in tail, freed and discharged from the 5,000*l.*; and that, by virtue of the same will, the same parties were then entitled, absolutely as tenants in common, to the 1,000*l.* consols, and 3,500 francs French stock. The bill prayed that Josias Cocke's will might be established, and that the rights of all parties under the same and under the settlement might be declared, and that the trusts thereof might be carried into execution.

As the trusts of the 1,000*l.* consols, and of the French stock, expressed in the settlement, were inoperative, those sums being subject to the trusts of Josias Cocke's will, and as the release of the 5,000*l.* was contained in the same instrument as those inoperative trusts, the question was, whether the plaintiffs and the defendant, their brother, could claim the benefit of the release, without giving effect to the trusts of the stock expressed in the settlement, or, in other words, whether, if they claimed the benefit of the release, they were not bound to give effect to the trusts of the stock expressed in the settlement.

Mr. *Jacob* and Mr. *Kenyon* for the plaintiffs, contended that the indorsement on the settlement, was a relinquishment of the right, if it ever existed, to make the plaintiffs and their brother elect whether they would take under the will or under the settlement.

Mr. *Knight Bruce* and Mr. *Coleridge*, for the defendant, Miles C. Seton. This is a clear case of election. At the time when

the settlement was made, the two sums of stock were
[*64] supposed *to belong to the wife; and, by one and the same deed, the sum of 5,000*l.*, which was the wife's absolute property, was given up in favor of the children, and the two sums of stock were settled on the husband and the children.

The children, therefore, cannot claim the benefit of the release without making good the rest of the settlement: for it is an invariable rule of this court, not to allow a party to claim both under and against the same instrument.

It being then clear that Mr. Seton, before the indorsement was made on the settlement, had a remedy by way of election, the only question is, whether he is barred of that remedy by the memorandum? Now that memorandum was made without any contract and without any consideration for it; and it does not contain any trace of an intention, on the part of Mr. Seton, to relinquish any remedy or right which he then had. The object of it was nothing more than to remove a cloud that otherwise would have rested on the title to the sums of stock; and, consequently, it would be gross injustice to hold that it prejudiced his rights.

Mr. *Neate* appeared for other parties.

THE VICE-CHANCELLOR:—At the time when the settlement was executed, the 1000*l.* consols, and the 3,500 francs of French stock, were subject to certain trusts declared by the will of Josias Cocke, under which Mrs. Seton was entitled to the income of those sums for her life, and, after her death, the capital was to belong to her children. It was, however, then sup-
[*65] posed that those two sums were *the absolute property of Mrs. Seton; and under that impression, the settlement was made by which it was intended that Mr. Seton should take a certain interest in a portion of the income of the stock. By the same settlement, Mrs. Seton released her late father's real estates, of which she was then tenant for life, with remainder to her children in tail, from the sum of 5,000*l.*, with which they stood charged under her father's will, and to which she had be-

come absolutely entitled under the will of her mother. That being the state of the case, it is perfectly plain that Mr. Seton has a right to say to his children: "If you will have the benefit of the release, you must give me what I claim under the settlement."

It was said, however, that Mr. Seton, after he was apprised of the mistake in the settlement, signed the indorsement on it, and that he thereby waived his right to compensation by way of election. But no one, I think, can look at the indorsement without seeing that it is nothing more than an admission that there was a mistake in the settlement, with respect to the two sums of stock; and that the sole object of it was to remove the doubts, which otherwise would have existed, as to the trusts to which those sums of stock were subjected. It is in as naked a form as can be; and contains no representation of intention, on the part of Mr. Seton, to waive any right which he might have under the settlement.

The consequence is that Mr. Seton now has the same rights under the settlement, as he had on the execution of it; and, therefore, his children must be put to their election.

*Declare that the children are bound to elect whether [*66] they will take against or under the settlement, and refer it to the Master to inquire and state which will be most for their benefit.

1840.—Grand v. Reeve.

GRAND *v.* REEVE.

1840: 26th June.

Testator, by his will, gave 500*l.* to A. and 1,000*l.* to B. to be paid within 12 calendar months after his wife's death. By a codicil of the same date, he reduced those legacies to 300*l.* and 500*l.* respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will of 500*l.* to A., he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that, by his will, he had given to R. 3,000*l.*, he reduced that legacy to 2,000*l.*; and then directed that the 300*l.* given to A. as well as the 1,000*l.* given to B., should not be paid till twelve months after the death of his wife. Held, taking all the instruments together, that B. was entitled to a legacy of 1,000*l.*

JAMES REEVE, by his will, dated the 21st of December, 1821, gave, amongst other legacies and annuities, the sum of 500*l.* to Robert Bass; and, to his wife's nephew, Frederick Charles Ganning, the sum of 1,000*l.*; and he directed that those legacies should be payable within 12 calendar months next after the decease of his wife, Frances Reeve: and he gave all his real and personal estate, subject to the payment of the legacies and annuities, to the defendant absolutely.

The testator made a codicil bearing the same date as his will, but written on a separate sheet of paper, which was attached to his will. It was partly as follows: "In consequence of the depression of all landed property, I give my said wife an annuity of 600*l.* per annum, only, for life, instead of the 700*l.* by my said will bequeathed to her. I also give to Mr. Robert Bass

[*67] *300*l.*, and to Frederick Charles Ganning, 500*l.* only, instead of the legacies of 500*l.* and 1,000*l.* by my said will respectively bequeathed to them."

On the 28th of October, 1824, the testator re-signed, re-sealed and re-published his will, in the presence of three attesting witnesses.

The testator made another codicil, which was dated the 30th of November, 1825, and was partly as follows: "This is a codicil to the last will and testament of me, James Reeves, of Halesworth, in the county of Suffolk, Esq., which will bears date the

21st day of December, 1821." * * * "And whereas I have also, in and by my said will, given and bequeathed unto Robert Bass, the sum of 500*l.*, to be paid within 12 calendar months next after the decease of the said Frances, my wife: now I do hereby revoke the said last-mentioned bequest, and, in lieu and stead thereof, I do hereby give and bequeath the sum of 300*l.* only, to be payable and paid at the same time, and in such and the like manner as the said bequest hereby revoked was directed in and by my said will, and, in other respects, I do ratify and confirm my said will."

The testator made another codicil, which was dated the 17th of February, 1826, and therein expressed himself as follows: "Whereas, by my will dated the 21st day of December, 1821, I have given my brother, Benjamin Reeve, the sum of 3,000*l.*; now, by this, my codicil to my will, I do hereby revoke the said bequest, and, in lieu and stead thereof, I do hereby give and bequeath, to the said Benjamin Reeve, the sum of 2,000*l.* only, to be paid within 12 calendar months after the decease of the said Frances, my wife; and I do *further direct that [*68] the legacy of 300*l.* given to Robert Bass, as well as the 1,000*l.* given to Frederick Ganning, shall not be paid, likewise, till 12 months after the decease of the said Frances Reeve, my wife."

The testator died on the 10th of December, 1826. Frederick Charles Ganning died in May, 1829. The plaintiff was his personal representative. Frances Reeve died in July, 1838.

The question was, whether the plaintiff, as Ganning's representative, was entitled to be paid 1,000*l.* or 500*l.*

Mr. *Knight Bruce* and Mr. *E. Montagu*, for the plaintiff. It is not necessary, in this case, to decide whether the republication of the will in 1824, republished the antecedent codicil; for it appears, from the subsequent codicil, that the testator considered that the republication had annihilated the intermediate codicil. By that subsequent codicil, the testator recites that he had, by his will, given to Bass 500*l.*, to be paid within 12 calendar months from the decease of his wife; and then he revokes that

bequest, and, in lieu thereof, gives him 300*l.* only, to be paid at the same time and in such and the like manner as the bequest thereby revoked was directed, by his will, and, in all other respects, he ratifies and confirms his said will. Then, in the codicil of 1826, he directs that the legacy of 300*l.* given to Bass, as well as the 1,000*l.* given to Ganning, shall not be paid till twelve months after the death of his wife. So that he there refers to the existing legacy to Bass; and, therefore, he must be taken to refer to what he considered to be the existing legacy to Ganning.

Taking, then, the whole of the instruments together, the [*69] fair conclusion is that he considered the first codicil to be inoperative; and that his intention was that Bass should take 300*l.*, and that Ganning should take 1,000*l.*

Mr. *Jacob* and Mr. *Blunt*, for the defendant:

The will and the first codicil were written on separate sheets of paper; but they were attached to each other: therefore the republication in 1824, was a republication of the codicil as well as of the will. We are not to say that a codicil is revoked, because, in other testamentary papers, there is an indication that the testator did not correctly recollect the contents of that codicil. As far as respects Bass, the codicil of 1825 was surplusage: but are we to say that, on that account, the prior codicil was revoked? Then comes the last codicil; with respect to which it may be observed that it contains no words of gift, but only a mistaken reference to the will with regard to Ganning. Now a mistaken reference does not amount to a gift, unless there are either words of gift, or something showing an intention to give. The testator's sole object in making that codicil was to postpone the payment of the legacies (which object, indeed, he had before accomplished,) until the end of 12 months after the death of his wife. That codicil is merely negative: it says that the legacies shall not be paid, &c. That does not make a new gift; it must be looked at as an inaccurate reference to the will. *Gordon* v. *Hoffman*;(*a*) *Gordon* v. *Lord Reay*;(*b*) *Crosbie* v. *Macdoual.*(*c*)

(*a*) Ante, Vol. VII. p. 29. (*b*) Ante, Vol. V. p. 274.
(*c*) 4 Ves. 610.

*THE VICE-CHANCELLOR:—There is a degree of ambiguity in this case, which is occasioned by the republication of the will and by the subsequent codicil; but then the second codicil does clearly express the testator's intention. [*70]

I do not observe that, in that codicil, any notice is taken of the prior one: it seems to proceed as if that prior codicil had not been in existence. For the testator says: "Whereas I have also, in and by my said will, given and bequeathed unto Robert Bass, the sum of 500*l.*, to be paid him within 12 calendar months next after the decease of the said Frances my wife: now I do hereby revoke the said last-mentioned bequest; and, in lieu and stead thereof, I do hereby give and bequeath the sum of 300*l.* only." Now the first codicil had revoked the bequest, in the will, to Bass, and had reduced his legacy to 300*l.*

Then the testator makes the codicil of 1826, by which, after reciting that he had given, by his will, 3,000*l.* to his brother Benjamin Reeve, he revokes that bequest and reduces it to 2,000*l.* and directs that the reduced legacy shall be paid within 12 calendar months next after the death of his wife. He then proceeds thus: "And I do further direct that the legacy of 300*l.* given to Robert Bass, as well as the 1,000*l.* given to Frederick Ganning, shall not be paid, likewise, till 12 months after the decease of the said Frances Reeve, my wife." Now a direction that a legacy shall not be paid until the expiration of a certain time, is, in effect, a direction that it shall be paid at the expiration of that time. And it is plain that the testator considered that, by his will, he had given Ganning a legacy of 1,000*l.*, and appointed *a time for payment of it. Then, by this third codicil, he makes an alteration in the time of payment appointed by his will, and directs that the legacy shall not be paid until 12 months after the death of his wife: whereas, by his will, he had directed that it should be paid within 12 months after that event. And although it is true, in the abstract, that the republication of the will was a republication of the codicil, yet, taking all these instruments together, my opinion is, that there is a gift of a legacy of 1,000*l.* to Ganning. [*71]

LAUTOUR *v.* HOLCOMBE.[1]

1842: 17th March.

Where a bill has been dismissed for want of prosecution against a defendant, who, at the hearing is held to be a necessary party; the court will not allow the plaintiff to bring him before the court again by supplemental bill, but will dismiss the bill with costs.

THE bill was filed by an uncertificated bankrupt against his assignees and certain other parties.(*a*) The assignees put in their answer, and afterwards obtained an order dismissing the bill, as against themselves, for want of prosecution, with costs.

The cause now came on to be heard, as against the other defendants.

Mr. *Bethell* and Mr. *Beavan*, for those defendants, contended that the assignees were necessary parties, and that the suit could not be heard in their absence.

Mr. *Wakefield*, Mr. *Koe* and Mr. *Lovat*, for the plaintiff, contended that the assignees were not necessary parties.

[*72] *THE VICE-CHANCELLOR, however, ruled the contrary.

The plaintiff's counsel then asked that the cause might stand over, and that the plaintiff might be at liberty to file a supplemental bill, for the purpose of bringing the assignees again before the court.

The defendant's counsel opposed the application, and cited *Bierdermann* v. *Seymour*,(*b*) and *Tyler* v. *Bell*.(*c*)

THE VICE-CHANCELLOR:(*d*)—The only thing asked is for leave to file a supplemental bill against the assignees. I am of

(*a*) See ante, Vol. VIII. p. 76. (*b*) 1 Beav. 594.

(*c*) 1 Keen, 826, and 2 Myl. & Cr. 89. (*d*) The judgment is given *ex relatione*.

[1] The decision in this case was affirmed by Lord Lyndhurst, at Easter Term, 1843. See 1 Phil. 262.

opinion I ought not to grant it; and for this very plain reason: it is admitted that the bill was properly dismissed as against the assignees, for want of prosecution. But that did not prevent the institution of a new suit against them: and I have yet to learn that, when a dismissal for want of prosecution is ordered against one defendant, the plaintiff can escape from the effects of the order, by filing a supplemental bill: and I am of opinion that what is asked cannot be allowed.

I am asked, expressly, to give leave, in the absence of those who have obtained the order, to dismiss. I might be thereby doing a great act of injustice, and should be deciding in the absence of parties concerned.

The bill was dismissed against them in November, 1836, and this application is made five years afterwards, when, in *all probability, they have abandoned all thoughts of this suit. They might have then had sufficient evidence of the fairness of the transaction, which may now have perished. It appears to me, that, after what has taken place, it would be most unjust if I allowed them to be brought back again to this suit. [*73]

The bill must therefore be dismissed with costs.

WATSON *v.* WATSON.

1840: 26th June.

Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death; but only ono of them survived the annuitant. Held that the capital of the stock which had been provided to answer the annuity, did not vest in the surviving child, on the annuitant's death; but vested, on the testator's death, in all the children then living, as tenants in common.

THOMAS STALKER, by his will dated the 29th of April, 1811, made the following amongst other bequests: "I give and be-

queath to my brother Daniel's children, Harriet and Maria, 500*l.* each; Captain James Murray, 100*l.*; to his daughter, Mary, 50*l.*; to my nephew, John P. Stalker, 1,000*l.*; to Edward Owen, of Wood-street, 50*l.*; to my cousin, Horace Watson, 300*l.*; to my brother, Joshua Stalker, 500*l.*; to each of the children of my sister, Dorothy Martin and John Martin, 100*l.* each; to Dorothy Martin, an annuity of 30*l.* a year, and, after, to her husband, if he survives her; to Jane Tunstall, daughter of my sister, Jane Tunstall, 150*l.*; to my sister, Mary Tunstall, an annuity
[*74] of 30*l.*; to William Bell, 100*l.*; to my brother *Joshua, and Esther, his wife, an annuity of 60*l.* a year, to go to the survivor; to Mary Stalker, eldest daughter of my brother Joshua, 200*l.*; to the next daughter, 200*l.*, to be paid when of age; to each of the younger children, 100*l.* to be kept out at interest and paid when of age; and I appoint my brother, Daniel Stalker, and James Watt to be my executors, to see the preceding carried into execution; wishing them to act in such manner as they may think best in everything: the residue of my property, if any, to be equally divided between my nephews and nieces; if the annuities are paid by the interest of purchasing money in the stocks; at the death of the different parties, the principal to be divided between the children of the deceased."

The testator died shortly after the date of his will. At his death, John Martin and Dorothy his wife, had six children living. Five of them died in the lifetime of John Martin; and the plaintiff, Daniel Watson, was their personal representative. John Martin survived his wife, and died in December, 1839.

Daniel Stalker survived his co-executor, James Watt, and afterwards died. The defendant, Horace Watson, was his executor.

The bill was filed against Horace Watson as the personal representative of the testator, and also against Mary Martin, who was the only surviving child of John and Dorothy Martin; and the question was, whether the sum of stock which had been purchased, out of the testator's assets, to answer the payments of the annuity of 30*l.* bequeathed to Dorothy Martin and John Martin, vested in Mary Martin on her father's death; or whether

*it vested in her and her deceased brothers and sisters, [*75] on the testator's death.

Mr. *Knight Bruce* and Mr. *Cooke*, for the plaintiff. The gift of the principal of the sum of stock, is an immediate gift: the enjoyment of it only is postponed. The bequests of 100*l.* each to the children of Dorothy and John Martin, are bequests to children living at the testator's death; and the bequest of the residue is to the testator's nephews and nieces living at the same time.

Mr. *Jacob* and Mr. *Chandless*, for Horace Watson, the testator's personal representative.

Mr. *Follett*, for Mary Martin. There is no gift of the principal of the sum of stock, until after the death of the surviving annuitant: in such a case the period of distribution and of the gift is the same. At the testator's death, there was no fund that could vest in the children of the annuitants. Where the principal of a fund is given, and a life-interest is taken out of it, it vests immediately; but not so where there is no immediate gift. In *Pope* v. *Whitcomb*,(a) the Lord Chancellor says: "By the terms of this will, the interest of the residue was given, by the testatrix, to her brother, William Pope; and the executors were authorized to place out the fund as they should think proper, during his life; and, from and after the death of William Pope, the residue itself was given, to the executors, in trust for the persons therein named, and the survivors and survivor of them, share and share alike, to be paid *or assigned to [*76] them respectively, as they should attain the age of 21 years, with interest in the meantime until they should be entitled unto and should receive their shares respectively. By this will, the testatrix bequeathed only the interest of the fund during the life of William Pope; the principal was not given until after his death. That also was the period assigned, by the testatrix, for the distribution of their proportions of the fund

(a) 3 Russ. 124.

during the life of William Pope; the principal was not given until after his death. That also was the period assigned, by the testatrix, for the distribution of their proportions of the fund among such of the legatees as were then of the age of 21, and from which the division of the interest was to be made with reference to those who had not attained that age. I think, therefore, that those only of the legatees who were living at the death of William Pope, are entitled to share this property." In the present case, there is no immediate gift except of the annuity; the principal is not given until after the death of the surviving annuitant: and, consequently, my client, who was the only child of the annuitants who was then living, is entitled to the whole fund.

THE VICE-CHANCELLOR:—I do not see much resemblance between this case and the case cited; as there, the question was, who was to take under the description of survivors and survivor.

In this case the testator, besides his sisters, Dorothy Martin and Mary Tunstall, and his brother Joshua, to each of whom he gives an annuity, mentions another sister, Jane, and another brother, Daniel, and makes certain gifts to their children, whom he names. Then he gives the three annuities; and, in a subsequent part of his will, he says: "The residue of my property, if any, to be equally divided between my nephews and nieces." That, therefore, is a gift to all the persons answering the [*77] description of his nephews and nieces, *whether before mentioned or not. Then he says: "If the annuities are paid by the interest of purchasing money in the stocks: at the death of the different parties, the principal to be divided between the children of the deceased." Now, as the annuitants were only three out of five of his brothers and sisters, it is plain to me that he meant to make, by this last clause, a bequest different from the gift of the residue to his nephews and nieces; that is, to the children of all his brothers and sisters. And, in my opinion, the true construction of the last bequest in the will, is, that as each annuitant dies, the principal of the stock purchased to answer the annuity, is to be divided between the children of

that annuitant; so that it is, in effect, an immediate gift, in remainder, to all the children of the annuitant: and, therefore, the children of the annuitants living at the death of the testator, took a vested interest in the principal of the stock, as tenants in common.

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*EMPRINGHAM *v.* SHORT. [*78]

1840: 4th, 6th, and 29th July.

On a motion to commit a defendant for a contempt, the defendant undertook to make reparation for the act complained of. Whereupon the Master was directed to inquire what reparation the defendant ought to make; and he was ordered to make such reparation accordingly; and to pay, to the plaintiff, the costs of the application and consequent thereon. Held that the report made in obedience to the order, did not require confirmation.

ON the hearing of a motion to commit the defendant for breach of an injunction, by which he was restrained from committing waste on part of the estates of the testator in the cause, the defendant undertook, by his counsel, to make such reparation for the damage done by him, as the Master should award: and, thereupon, an order, dated the 25th of May, 1839, was made, which, after referring to the undertaking, proceeded thus: "This court doth order that it be referred, to the Master of this court, in rotation, to inquire what reparation the defendant, James Short, ought to make for the damage done to the testator's estate, in ploughing up the 12 A. 1 R. 4 P. of pasture land in the pleadings mentioned, and sowing the same with mustard, flax, and poppy seed: and it is ordered that the defendant, James Short, do make such reparation accordingly, and pay, unto the plaintiff, the costs of this application and of the said inquiry, and consequent thereon, to be taxed by the Master."

On the 9th of November 1839, the Master, in obedience to that order, reported as follows: "I am of opinion that the reparation which the said defendant James Short ought to make

for the damage done to the said testator's estate, in ploughing up the 12 A. 1. R. 4 P. of pasture land in the pleadings mentioned, and sowing the same with mustard, flax and poppy seed, is the sum of 150*l.*, to be paid by him into the bank to the credit of this cause, and that the said defendant James Short shall be [*79] permitted to use the *said land as arable land in future, treating the same in a good and husband-like manner; and that he shall take, therefrom, no more than two crops of corn in succession, without fallowing, one of such crops only to be wheat; and shall not, in future, plant or sow, on the said land, any mustard, flax, hemp, poppy seed, woad or other injurious roots or seeds, or permit any cole or turnips to stand thereon for a crop of seed: and the said defendant is to make such reparation accordingly, as the said order directs: and the bill of costs, of the said plaintiff, of the application for the said order and of the said inquiry and consequent thereon, amounting to the sum of 51*l.* 7*s.* 10*d.*, I have taxed at the sum of 48*l.* 0*s.* 2*d.*: and the same is to be paid by the said defendant James Short to the said plaintiff, as the said order also directs.(*a*)

The plaintiff did not move to confirm the report; but, on the 25th of November, 1839, he obtained an order, on notice, for payment of the 150*l.* into Court, pursuant to the report.

Mr. *Knight Bruce* and Mr. *Sharpe* for the defendant, now moved to discharge that order, for irregularity, on the ground that it had been obtained without the report being confirmed; whereby the defendant was prevented from excepting to the report as he had intended to do. They cited *Chennell* v. *Martin*,(*b*) and *Scott* v. *Livesey*,(*c*) and 2 Smith's Pract. 357.

[*80] *Mr. *Jacob* and Mr. *W. M. James*, for the plaintiff, said that, as the report had been made in pursuance of an interlocutory order, it did not require confirmation; and that it appeared, from the order, that the report to be made in pur-

(*a*) That part of the above report which relates to the mode of cultivating the land in future, seems not to have been warranted by the order.

(*b*) Ante, Vol. IV. p. 340. (*c*) 3 Sim. & Stu. 300.

suance of it, was to be final; for, otherwise, it would have concluded in the following words: "And thereupon such further order shall be made as shall be just; and, moreover, it directed the defendant to make the reparation, and to pay, to the plaintiff, the costs of the application and consequent thereon.

THE VICE-CHANCELLOR:—I have had a conversation with the Registrar, upon the subject of the order sought to be discharged in this case; and I find that it is difficult to determine, by any general rule, what are the reports which this court requires to be confirmed, and what are those reports which are taken to be sufficient for the court to act upon, though they be not confirmed. With respect to the latter class of reports, it seems to be rather singular that, notwithstanding they do not require confirmation, yet they may be excepted to.

But, when I look at this particular report, coupled with the order which gave rise to it, and see the way in which the order was drawn up, I cannot but think that it is a report which ought to have been confirmed; and that it was quite a surprise upon the defendant to move, in the way that was done, that the money should be paid into court.

The order of reference in this case, was of a very special kind; and, under it, the Master finds what sum ought to be paid by way of reparation for the damage done to that part of the testator's estate which was in *the defendant's possession; and that the sum ought to be paid by the defendant, into court, to the credit of the cause. Then the Master goes on to state, as part of his finding, the particular mode of using the land in future. [*81]

Now the court was not asked, by the notice of motion upon which the order of the 25th November was made, to confirm the report; but to carry only a portion of it into execution. The defendant had carried in objections to the report; and it strikes me that, if the notice of motion had been to confirm the report, he would have seen what was the object of the party, and most probably would have matured his objections into exceptions.

But the particular mode in which the notice was given, appears to me to have thrown him off his guard.

I cannot but think that the report, upon the face of it, is one that required confirmation, and that the order that was drawn up was wrong; and the Registrar informs me that, if his attention had been called to the report, he would not have drawn up order, without the report being confirmed.

The consequence is that the order of the 25th of November the 1839, must be discharged with costs.

On the 29th of July, the plaintiff moved Lord Cottenham, C., to discharge the Vice-Chancellor's order.

His lordship said that the order of the 25th of May was final; that it directed the defendant to make the reparation, [*82] when the amount should be ascertained by *the Master: and his lordship granted the motion, and direeted the defendant to pay the costs of the application made to the Vice-Chancellor.

1840.—Stopford v. Lord Canterbury.

Stopford *v.* Lord Canterbury.

1840: 1st and 2d July.

A., on his son's marriage, vested certain funds in trustees, in trust, after the deaths of himself and his son, for the daughters of the marriage at the usual periods, and, in the meantime, to apply the income of each daughter's share, or so much thereof as the trustees should think proper, for her maintenance and education. The son died, leaving an only daughter, an infant. Her mother married again. The infant, to whom no guardian was appointed, was maintained and educated by her mother and step-father; and A. paid them, first, 200*l.*, and afterwards 300*l.* a year, on the infant's account; and, upon A.'s death, his widow continued to pay the 300*l.* a year, and received the income of the trust funds for her own benefit, conceiving that she was entitled so to do under A.'s will. The infant being about to be married, the settlement was referred to; and it was then discovered that the income of the trust-funds amounted to 800*l.* a year. Whereupon the mother and her second husband, who had expended much more than the 300*l.* a year in the infant's maintenance and education, filed a bill against A.'s widow and the trustees, (but without making the infant or her husband parties,) in order to recover their extra expenditure. The trustees admitted that the extra expenditure had been properly incurred, and that they should have increased the allowance for the infant, had they been applied to. The court directed the Master to inquire what was proper to be allowed, to the plaintiffs, for the infant's maintenance and education, from A.'s death until the infant's marriage.

By the settlement on the marriage of Richard John Tibbits, the son of Charles Tibbits, with Horatia Elizabeth Lockwood, dated in April, 1817, certain estates in Warwickshire, the property of Charles Tibbits, were limited to Charles Tibbits, for life, with remainder to R. J. Tibbits, for life, with remainder to the first and other sons of the marriage, successively, in tail male, *with remainder to trustees, for the term of 600 years, [*83] upon trust to raise the sum of 10,000*l.*, for or towards the portion of the daughter or daughters of the marriage, and to be paid to, and become vested in her or them, on her or their attaining 21, or marrying under that age: and it was declared that the trustees should stand possessed of the sum of 13,793*l.* consols therein mentioned, in trust for Charles Tibbits, for his life, and, after his decease, in trust for Richard John Tibbits, for his life, and, after the decease of the survivor of them, upon the trusts thereinafter declared: and it was thereby declared that, when certain stocks,

funds, and securities, constituting the portion of Horatia Charlotte Lockwood, should be transferred to the trustees pursuant to the trusts and directions thereinbefore contained,(a) the trustees should stand possessed thereof in trust for R. J. Tibbits during his life; and that, subject thereto and to the trusts thereinbefore declared concerning the 13,793*l.* consols, the trustees should stand possessed thereof and of the stocks, funds and securities so constituting the portion of Horatia C. Lockwood, in trust for the children of the marriage, (except an eldest or only son,) who, being sons, should attain 21, or being daughters, should attain that age, or marry under it, and if, at the death of the survivor of Charles Tibbits and Richard John Tibbits, there should be living any child who should not then have attained a vested interest under the last-mentioned trust, then upon trust to pay the dividends of such child's presumptive share of the trust-fund, or so much of such dividends as the trustees should think proper, in and toward the maintenance and education of such child, until his or her share should become vested and [*84] payable; and to lay out the residue of such *dividends to accumulate, and the accumulations to be held upon the same trusts as the share out of which they should have arisen, should, for the time being, be subject to.

Richard John Tibbits died in 1821, leaving his wife surviving, and also a daughter, Mary Isabella Tibbits, then only two years and a half old, who was the only issue of the marriage.

From the death of Richard John Tibbits until the death of Charles Tibbits, the latter paid, to Horatia Charlotte Tibbits, 200*l.* a year, for the maintenance and education of Mary Isabella Tibbits; and, after she attained the age of seven years, he, in consequence of an application made to him by H. C. Tibbits, paid her yearly, the further sum of 100*l.* for the same purpose; and the 300*l.* a year continued to be paid during the lifetime of C. Tibbits, on the footing that the whole amount provided for the maintenance of the infant, by the settlement, was the sum of

(a) It did not appear that these funds were ever transferred.

200*l.* a year, and that the further sum of 100*l.* a year, was paid by way of gift by Charles Tibbits.

Charles Tibbits being seized in fee of the Warwickshire estates, subject to the limitations and trusts of the settlement, and also of estates in Northamptonshire and Buckinghamshire, made his will dated the 18th of June, 1828; and, thereby, after reciting that, in consequence of his son, Richard John Tibbits, having died without issue male, he was seized in fee of the Warwickshire estates, subject to the term of 600 years created by his son's settlement, for raising 10,000*l.* for the portion of an only daughter of the marriage, to vest in her at 21, or on marriage, with power, to the trustees of the term, to raise such sum annually for the maintenance of such *daughter, until her [*85] portion should become payable, as they should think fit, not exceeding the interest of her portion at the rate of four per cent. per annum; and that his estate in Northamptonshire was vested in him in fee, subject to a rent charge of 1,200*l.* per annum, payable, thereout, to his daughter-in-law, Horatia Charlotte Tibbits, for her jointure, and to a term of 500 years for better securing that jointure, and for raising, in the event which had happened, of the death of his son in his lifetime leaving issue of his marriage, a yearly sum of 200*l.*, during the testator's life, for the maintenance of the child of that marriage; and that his grand-daughter, Mary Isabella Tibbits, would, in case of her surviving him and attaining the age of 21 years, or being married, be entitled, under the trusts declared in the settlement of his Warwickshire estates, to the sum of 13,793*l.* consols, and would, under the same settlement, be entitled, in case of her surviving her mother, to have the interest of her mother's portion applied for or towards her maintenance during her minority; he devised his estates in the three counties before mentioned and elsewhere, to trustees for 200 years, to commence from the day of his decease, and upon the trusts thereinafter declared, and, subject thereto, to the use of his wife, Mary Tibbits, for her life, with divers remainders over: and he declared the trusts of the term of 200 years to be for raising the yearly sum of 600*l.* to be applied in keeping his mansion-house in Northamptonshire and

Bryanstone-square in repair; and, if the determination of the estate thereinbefore limited to his wife, should happen during the minority of his grand-daughter, Mary Isabella Tibbits, then that the trustees of the term should, during the minority of his grand-daughter, receive the rents of the devised estates, and, after applying the annual sum of 600*l.* in the manner before men-
[*86] tioned, should apply the surplus thereof, or so much thereof as they, in their discretion, should think fit, for the maintenance, education or benefit of his grand-daughter, in such manner as to them, in their uncontrolled discretion, should seem meet, or, if Horatia Charlotte Tibbits should be living and remaining his son's widow, to pay such surplus or any part thereof, at their or his uncontrolled discretion, to Horatia Charlotte Tibbits, being a widow as aforesaid, for the better support and maintenance of herself and Mary Isabella Tibbits, and the education of the latter; and to accumulate the residue of the rents of the devised estates, and to stand possessed of the accumulations in trust to transfer the same to Mary Isabella Tibbits on her attaining 21, or being married: and he appointed his wife the executrix of his will.

After the date of the will, Horatia Charlotte Tibbits married Colonel Stopford, with the approbation of the testator; and the testator afterwards made a codicil to his will, by which he bequeathed a leasehold house in Connaught-square which he had purchased, to trustees in trust to permit Colonel and Mrs. Stopford, and the survivor of them, to have the use and enjoyment thereof during their lives and the life of the survivor, rent free; and he directed his executors to pay the ground-rent of the house out of his personal estate, and that, subject thereto, the house should be considered as part of his personal estate.

The testator died on the 19th of July, 1830; and, on his death, Mary Tibbits entered into the possession or receipt of the rents of his real estates, and into the receipt of the dividends of the 13,793*l.* consols, and she continued in such possession or receipt at the institution of the suit.

[*87] *The bill, which was filed in December, 1837, by Colonel and Mrs. Stopford, against the trustees of the settle-

ment and Mary Tibbits, after stating as above, alleged that the infant resided with the plaintiffs until her marriage, and that Mary Tibbits paid to the plaintiffs the yearly sum of 300*l.*; and that the same was paid to them, as the whole amount to which the infant was entitled, for her maintenance and education under the trusts of the settlement; and that the plaintiffs were given to understand, and did, in fact, understand and believe, until the time after mentioned, that the yearly sum was the full amount of the provision secured, under the trusts of the settlement, for the infant's maintenance and education; that the plaintiffs maintained and educated the infant in a manner suitable to her station in society, and applied the 300*l.* a year for that purpose; but the expense incurred by the plaintiffs in respect of the infant's maintenance and education, considerably exceeded that sum; that, early in the year 1836, the plaintiffs applied to Mary Tibbits to increase the allowance, but she refused so to do; that, in 1837, upon the occasion of the treaty for the infant's marriage,(*a*) it was necessary to refer to the settlement; and the plaintiffs then ascertained, for the first time, that the funds applicable for the infant's maintenance greatly exceeded 300*l.* a year, and would have been sufficient to indemnify the plaintiffs for the expenses incurred by them in the infant's maintenance and education; that, with the exception of the 300*l.* a year, Mary Tibbits had received and applied, for her own purposes, the whole amount of the rents of the manors, messuages, &c., stocks and funds out of which the amount properly applicable for the infant's maintenance *and education ought, pursuant [*88] to the trusts of the settlement, to have been paid: that, upon discovering the amount of the funds provided for the infant's maintenance and education, the plaintiffs applied to Mary Tibbits to pay them a sufficient sum to defray the expenses incurred by them, as before mentioned; but she refused to make them any payment beyond the 300*l.* a year.

The bill prayed that the defendants might be decreed to pay to the plaintiffs, under the trusts of the settlement, the full

(*a*) The infant married Lord Hood, in June, 1837.

amount of the expenses incurred by the plaintiffs, in respect of the infant's maintenance and education, beyond the 300*l.* a year; and, if necessary, that it might be referred to the master to take an account of the amount proper to be allowed to the plaintiffs, in respect of the infant's maintenance and education, beyond the 300*l.* a year; and that the defendants might be decreed to pay to the plaintiffs what the master should find to be the proper amount to be paid to them for that purpose.

The defendant, Mary Tibbits, in her answer, set forth a part of the testator's will, not contained in the bill, by which the testator devised all his real estates, after her decease, to the infant and her sons and daughters in strict settlement, and declared that such devise was made upon condition that the infant, either alone or together with any husband whom she might marry, should, within twelve calendar months next after she should have become competent in that behalf, upon being requested so to do by the trustees of the testator's residuary personal estate, release his Warwickshire estates from the 10,000*l.* and the interest thereof, and should, within the like period, assign
[*89] the 13,793*l.* consols, and also *her mother's portion, to the last mentioned trustees, upon the trusts thereinafter declared of such residue; and that, in case the infant or her husband should refuse or neglect to make such release or assignment, then all the limitations therein contained to or in favor of the infant or her issue, should cease. The answer then stated that the residue of the testator's personal estate was, by his will, bequeathed to trustees, in trust to be invested in the purchase of real estates to be settled to the same uses as the devised estates, with directions that the interest, dividends, and annual produce of such residue, should, in the meantime, go and be paid to such person or persons as the rents of the estates to be purchased would have gone, in case such purchases had been made. The answer also stated that, from 1830 to 1835, both inclusive, the infant and her governess and maid-servant had resided, for several months in each year, with the defendant; that, from 1830 to 1837, the defendant had paid, for the salary of the governess and otherwise for the infant's use or benefit, sums amount-

ing, in the whole, to 1,980*l.*; that she did not believe that the 300*l.* a year was insufficient to meet such of the expenses of maintaining and educating the infant in a manner suitable to her station in society, as were borne by the plaintiffs, or that the expenses incurred by the plaintiffs, in respect of the infant's maintenance and education, did considerably exceed 300*l.* a year; that she considered that the amount of expenditure, in respect of the maintenance and education of the infant, except the yearly sum of 200*l.*, was, by her late husband's will, left in her discretion; and she was led to suppose that the 200*l.* a year continued payable for the infant's maintenance, under this settlement, from the circumstance of an abstract of the will having been delivered to her, in which it was omitted to be stated that the 200*l.* a year *was payable during the testator's life only; and [*90] that she acted throughout under that impression. The defendant, at the conclusion of her answer, claimed the same benefit from it, as if she had demurred to the bill for want of equity.

The trustees, in their answer, said that they believed that the sums expended by the plaintiffs in the infant's maintenance and education, considerably exceeded 300*l.* a year; that, in 1837, they received from the plaintiffs a statement of such expenses, and, having been advised that the same was just and reasonable, they wrote a letter to the defendant, Mary Tibbits, in which they stated that they were bound to consider the claim which was made in January, 1836, upon her, for an increase of the infant's maintenance from that time, to stand in the same situation as if it had been made upon them personally; and that they were of opinion that, if the claim had been made upon them, they should have awarded an allowance of 700*l.* a year, from January, 1836, to the then present time; and that they were of opinion that the payments made by Mary Tibbits to Mrs. Stopford, from 1831 inclusive to January, 1836, ought to be made up to 550*l.* per annum, which would not reach the actual expenditure incurred; and that, from January, 1836, down to the then present time, the payment ought to have been made after the rate of 700*l.* per annum. The trustees further said that, if the plaintiffs had ap-

plied to them, at an early period, for an increase of the allowance for the infant's maintenance, they should have been ready and willing to have made such an additiou thereto, by virtue of the discretionary power vested in them, as to them should have appeared just and reasonable; and that they were satisfied that the expenses incurred by the plaintiffs, in the infant's [*91] *maintenance and education, had been properly incurred, and that the plaintiff ought to be repaid the same.

Mr. *Knight Bruce* and Mr. *James*, for the plaintiffs:

The trustees, not being aware of the nature of their trust, and no application having been made to them respecting the infant's maintenance, allowed Mrs. Tibbits to receive the whole of the rents of the estate and of the dividends of the stock out of which the maintenance was to come. They admit, however, in their answer, that the sum which was paid for the infant's maintenance was inadequate, and that, if an application had been made to them, they should have exercised the discretion given to them by the settlement, and granted a considerable increase. Mrs. Tibbits must be taken to have had notice of the trust; and, as the funds which were subject to the trust, have come into her hands, she has become a trustee of them. The real fact is that all parties have acted under a mistake; and, on that ground, the court ought to interfere.

The case of *Maberly* v. *Turton*,(*a*) is a strong authority for allowing past maintenance in the present case.

Mr. *Stuart* and Mr. *K. Parker*, for the trustees, said that their clients considered the claim made by the plaintiffs, to be fair and reasonable, but that they left it to the decision of the court.

Mr. *Jocob* and Mr. *Stinton*, for Mrs. Tibbits:

The case of *Maberly* v. *Turton* is distinguishable from [*92] the present; for, in that case, there being no *acting

(*a*) 14 Ves. 499.

trustee, the father of the infants had received the income of the trust fund and applied it for the maintenance of his children, and the only question was whether he ought to be allowed the sums which he had so applied; and, therefore, it was referred to the master to inquire whether it would have been reasonable and proper for the trustees to apply any, and what part of the income of the fund for the children's maintenance.

The bill alleges that, for seven years, the infant resided with the plaintiffs and was maintained by them, and that they expended much more than 300*l.* a year on account of her maintenance; but Mrs. Tibbits, in her answer, expressly denies those allegations, and there is no evidence in support of them. She swears that, during the first five years, the infant, for several months in each year, resided with and was maintained by her, and that she paid the governess's salary and defrayed other expenses to a large amount, on the infant's account; and that the 300*l.* a year was sufficient to meet all the expenses which the plaintiffs incurred on the infant's account. So that not only is there no evidence of any extra expenditure on the part of the plaintiffs, but, if the court were to enforce the claim made by the bill, Mrs. Tibbits would have to pay twice for the infant's maintenance.

It is difficult to discover the principle upon which the claim made by this bill is founded. If a person maintains another person's child, he may have a moral claim to be reimbursed what he has expended in maintaining the child; but he can have no claim which he can enforce either in a court of law or in a court of equity. The infant naturally resided with her mother and step-father; and they received 300*l.* a year from Mrs. *Tibbits; but neither Mrs. Tibbits nor the trustees entered into any contract with them for the maintenance of the infant. They were not appointed the guardians of the infant, nor indeed was any other person appointed her guardian, and, if this bill is sustainable, any person whatever who had expended money for the infant, or the governess, on the ground that she had received an inadequate salary, might file a similar bill. The plaintiffs, after having contributed to the maintenance of the in- [*93]

fant for several years and received a certain yearly sum for that purpose, discovered that a larger provision had been made for her than they were before aware of; and, in consequence of that discovery, they come to this court and allege that they have expended more than the 300*l.* a year in the infant's maintenance, and ask to be reimbursed their extra expenses. Even where an infant is a ward of the court, it is by no means of course to make an allowance for past maintenance. There is, however, a great difference between the case of this infant and that of a ward of court; for, in the latter case, the court has a certain control over the infant's property, and assumes to do what the infant is morally bound to do; but such a claim as is now made was never before heard of. If a person who had maintained an infant, were to file a bill, for the money which he had expended, against the infant after it had attained majority, there can be no doubt that the bill would be dismissed, there being no contract or trust to support it. It is said, in this case, that all parties were under a mistake as to the amount of the provision made for the infant, and that the mistake was not discovered until the infant was about to be married. But, if the discovery had been made at an earlier period, no increase of the allowance would [*94] have been made for the time past; *although, if the infant had been a ward of court, an increase would have been made for the time to come. For the future maintenance might be upon a higher scale; but the bygone maintenance, which the court would assume to have been commensurate to the allowance, could not be put upon a better footing.

It clearly appears from the testator's will that he intended his grand-daughter to renounce all her right to the interest as well as the principal of the sums to which she was entitled under the settlement, and that his widow should receive the interest of those sums during her life; and, although his grand-daughter would be thereby deprived of all provisions during her grand-mother's lifetime, yet he doubtless thought that he could safely trust to the affection and liberality of the grand-mother, to make a proper provision for her grand-child.

Lastly we submit that, at all events, the claim made by this

bill cannot be dealt with, without having Lord and Lady Hood before the court.

Mr. *Knight Bruce* in reply:

The objection, for want of parties, has been taken too late. The defendants have elected to abide by the consequences that may result from any deficiency of parties; and the cause must now proceed in its present state; and be disposed of on its merits. Mrs. Tibbits has received that income which was applicable to the maintenance of Lady Hood; and the object of the suit is to recover from her the extra expenditure incurred, by the plaintiffs, in maintaining and educating Lady Hood. Neither Lord nor Lady Hood can be prejudiced by anything that can take place in this suit.

This court encourages the maintenance and education [*95] of infants; and, on that ground, and not on the ground of contract, it allows a person who has been maintaining an infant, a reasonable compensation out of the property of the infant which is applicable to maintenance. If an infant has a large expectancy, but no present provision, the court, on the infant succeeding to its fortune, will allow past maintenance to the relative, or even to the father, who has maintained the infant. The infant is not interested in the past, but only in the future maintenance; and, therefore, the person who has incurred the expenditure, and not the infant on whose behalf it has been incurred, is the proper person to apply for the reimbursement.

It is admitted that the trusts of the settlement were forgotten by all parties; in consequence of which the trustees never exercised, nor were called upon to exercise the discretion given to them, by the settlement, respecting the provision for the infant's maintenance, nor acted, in any other manner, in the execution of the trusts of the settlement: and, that being so, the principle of the decision in *Maberly* v. *Turton*, applies to the present case: for, there, Lord Eldon, C., says: "The fact that there were no trustees, or that the trustees never acted, which is in effect the same, imposes upon the court the necessity of examining, strictly, what the trustees ought to have done." And his lord-

ship then directs a reference to the Master, with a view to the court's exercising that discretion which, by the will, was vested in the trustees. That case corresponds, in every respect, with the present; and, on the principle established by it, as well as on the long acknowledged ground of mistake, this court is bound to interfere in the manner prayed by the bill; more espe-
[*96] cially *as the trustees admit that, in addition to the board and lodging furnished by Mrs. Tibbits, and the sums which she alleges she expended on the infant's account, an expenditure greatly exceeding the allowance of 300*l.* a year, was properly incurred by the plaintiffs, and ought to be reimbursed to them; and as they admit also that, if the plaintiffs had applied to them, at an earlier period, for an increase of the allowance, they should have granted it, by virtue of the discretionary power vested in them by the settlement, which they were not aware that they possessed, until it was called to their attention shortly before the infant's marriage.

Then it has been argued that the effect and intention of the will was to deprive the infant of the provision made by the settlement, for her maintenance: but I deny that that is the effect of the will, or that any such effect could be given to it.

[The Vice-Chancellor:—I will not trouble you to argue that point: for the words, "the interest thereof," are applied to the sum of 10,000*l.* only; and it seems to me that, of necessity, those words cannot mean the interest to accrue during the infant's minority.]—The will then being out of the question, I ask for a reference to the Master in such terms as will give Mrs. Tibbits the benefit of every shilling which can be brought by her into account and set off against the claim of Colonel Stopford.

The Vice-Chancellor:—In this case, the young lady in question, was contingently entitled, under the settlement made on the marriage of her father and mother, to the sum of 10,000*l.* which was secured by a term of 600 years, and also to
[*97] *the sum of 13,793*l.* consols: and the trustees of the settlement, if they had thought proper, might have applied

the whole of the interest of the 10,000*l*, at four per cent., and of the dividends of the 13,793*l*. consols, for her maintenance and education, during her minority or until she married. In point of fact, however, the trustees never exercised any discretion whatever, as to the amount of the sum proper to be allowed for the purposes before mentioned.

The young lady lived with Colonel Stopford, who had married her mother after her father's death; and the trustees allowed her grandmother to receive the whole rents of the estates comprised in the term of years, of which she was tenant for life, subject to the term; and also allowed her to receive the dividends of the consols. It is stated, however, that the trustees, if their attention had been called to the subject, would have allowed for the young lady's maintenance and education, 550*l*. a year at one time, and 700*l*. at a subsequent time; so that, at any rate, they would have allowed considerably beyond 300*l*. a year, which was the amount of what Mrs. Tibbits herself paid for the maintenance of her grand-child. Although the discretion to which I have alluded, was vested in the trustees, yet it seems that they did not exercise it, because Colonel and Mrs. Stopford were not aware of the provision made, by the settlement, for the maintenance and education of Miss Tibbits, and, therefore, never applied to the trustees to exercise any discretion on the subject. It seems to be very singular indeed that they were not aware of it; because Colonel Stopford and his wife took a benefit under the codicil to the will; and the will itself seems sufficiently to call the attention of parties who read it, to the fact that there was this settlement, *both of the 10,000*l*., and also [*98] of the consols, for the benefit of the testator's grand-daughter; and, indeed, the very provision that the will makes for the grand-daughter releasing her right to those sums as soon as she should be competent so to do, sufficiently indicates the fact that a portion was provided for her, and that she was entitled to be maintained and educated out of the income of it, until the capital should become vested in her; although nothing very definite is said about the discretion of the trustees. But, as I said before, the trustees did not exercise any discretion; and

matters were allowed to go on as before, until after the marriage of the young lady, and then this bill was filed, which demands payment of that sum which ought to have been allowed, if the trustees had exercised the discretion given to them by the settlement.

Now I cannot but think that the letter which was written to Mrs. Tibbits, by the trustees, sufficiently shows what the opinion of the trustees was, and that, therefore, though there be no admission in the answer of Mrs. Tibbits, that enough was not paid; yet the mode in which the trustees have dealt with the question, raises sufficient grounds for directing an inquiry on the subject. My opinion is, that if, in point of fact, Colonel Stopford was at any expense for the maintenance and education of this young lady in a liberal manner, beyond what the sum of 300*l.* a year allowed by the grand-mother, would satisfy, according to the doctrine of this court, he would have been entitled to have called on the trustees to exercise the discretion given to them by the settlement, if he had been aware that they had any such discretion; and, if they had exercised a fair discretion, he would then have received, from them, what they thought proper to
[*99] be allowed; *and, if the court had thought that the discretion was fairly exercised, he could have obtained no more. But, if the trustees had not chosen to exercise any discretion on the matter, I take it to be perfectly clear that this court would have interfered, and have exercised a discretion for them.

Inasmuch as what has occurred in this case, appears to have happened by a sort of mistake, by an accidental want of knowledge or consideration of what the real circumstances of the case were, I apprehend that this court will interfere.

And as the sums of money, which might have been applicable for the increased maintenance, have been, in fact, received by Mrs. Tibbits, I do not feel my mind very much oppressed by the objection that there are not sufficient parties before the court; because I apprehend that the money which ought to have satisfied the increased maintenance, did, by mistake, come into the hands of Mrs. Tibbits. She, therefore, is the person who can,

eventually, be made accountable for it; and I do not think it necessary at present that there should be any further parties to the record. My opinion, therefore, is that there ought to be such a referance as that which is asked. . . .

Let it therefore be referred to the Master, to inquire and state what, if anything, is proper to be allowed and paid to the plaintiff, Colonel Stopford, in respect of the expenses of the maintenance and education of the infant, from the death of her grandfather to the time of her marriage, beyond the yearly sum of 300*l.*, with liberty to state all special circumstances; and reserve further directions, and give all parties liberty to apply as they shall be advised.

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*Fulcher *v.* Howell. [*100]

Although, on the death of the assignee of an insolvent's estate, any creditor of the insolvent may get a new assignee appointed by the Insolvent Debtors' Court, and all the insolvent's property which was vested in the deceased will immediately thereupon become vested in the new assignee, yet, where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the executors of the deceased assignee.

The plaintiffs were interested in the personal estate of Nathaniel Fulcher, deceased, under the trusts of his will. Nathaniel Fulcher, a son of the testator, was a legatee under the will, and the sole acting trustee and executor thereof. In August, 1824, the plaintiffs filed a bill against Nathaniel Fulcher, the son, and the other executors and trustees, praying that the trusts of the will might be executed under the direction of the court, and that an account might be taken of the testator's personal estate and effects which had been received by Nathaniel Fulcher, the son, and that the same might be applied in a due course of administration; and that Nathaniel Fulcher, the son, might be decreed to make good what should appear to be due from him on taking

the account, and might be charged with interest on sums improperly retained, received, or converted by him.

All the defendants answered the bill, and a receiver of the testator's personal estate was appointed; but no further proceedings were had in the suit until May, 1840, when the plaintiffs filed a supplemental bill, alleging that it had been lately discovered, as the fact was, that on or about the 3d of March, 1828, Nathaniel Fulcher, the son, took the benefit of the Act then in force for the relief of Insolvent Debtors, and that his estate and effects were assigned to George Howell, in trust for himself and the other creditors of Nathaniel Fulcher; and that the plaintiffs were advised that the beneficial estate and interest of [*101] Nathaniel Fulcher, under the *will of the testator, thereby became vested in Howell, subject, nevertheless, to such equities as affected the same, as against Nathaniel Fulcher, in favor of the plaintiffs and the other parties interested under the will; that, in May, 1832, Howell died, having made his will, and thereby appointed the defendants, Ann Barbara Howell, Thomas Foster, Thomas Lovell Rogers, and William White, executrix and executors thereof; that, by reason of the insolvency of Nathaniel Fulcher and of the assignment of his estate and effects, the original suit and the proceedings therein became defective; and that the plaintiffs were advised that, inasmuch as no assignee of the estate and effects of Nathaniel Fulcher had been appointed in the place of Howell, Nathaniel Fulcher's beneficial estate and interest under the will, became, upon Howell's death, and still were vested in the defendants as his representatives; and that the plaintiffs were entitled to prosecute the suit against them, and to have the same or the like relief in respect of the defaults, misfeasances, and liabilities of Nathaniel Fulcher, in the original bill mentioned, in respect of such beneficial estate and interest, as they would have been entitled to have against Nathaniel Fulcher, if he had not become insolvent and made such assignment of his estate and effects as before mentioned; that the defendants, as representing Nathaniel Fulcher, claimed to be entitled to such beneficial estate and interest as

Nathaniel Fulcher was entitled to at the time of his discharge under his insolvency.

The supplemental bill prayed that the plaintiffs might be declared to be entitled to the benefit of the original suit and the proceedings therein, and to prosecute the same against the defendants as Howell's legal personal representatives; and that they might have the *same or the like relief, in [*102] respect of the matters contained in the original bill, and, in particular, as to the defaults, misfeasances, and liabilities of Nathaniel Fulcher in the original bill mentioned, in respect of his said beneficial estate and interest, so far as the same would extend and could be made available, as they would have been entitled to against Nathaniel Fulcher if he had not become insolvent, and not made the said assignment of his estate and effects.

The defendants demurred to the supplemental bill, because no assignee of Nathaniel Fulcher, the insolvent, was made a party thereto.

Mr. *Jacob* and Mr. *Chandless*, in support of the demurrer:

The bill seeks to charge the interest of the insolvent executor, with all his defaults and misfeasances; but no person capable of protecting the interest of the creditors under the insolvency, is a party to the suit. It is of the utmost importance to the creditors that there should be an assignee appointed; and under the 65th sect. of 1 & 2 Vict. c. 110, (for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England,) the plaintiffs may get a new assignee appointed at any time. That section enacts that, in case of the death of an assignee of the estate and effects of an insolvent, it shall be lawful for any creditor of the insolvent to apply to the Insolvent Debtors' Court to appoint a new assignee, with like powers and authorities as are given by the Act to the original assignee; and that the Court shall have power to compel the heirs, executors, or administrators *of the deceased assignee to account [*103] for and deliver up to the Court, or as the Court shall

order, all such estate and effects, books, papers, writings, deeds, and other evidences relating thereto as shall remain in his or their hands, to be applied for the purposes of the Act; and that the decision of the Court in the matters aforesaid shall be final and conclusive; and that, from and immediately after such appointment of a new assignee, and by virtue of the order of the Court in that behalf, all the estate, effects, rights, and powers of the insolvent, vested in the former assignee, shall become vested in the new assignee, without any assignment or conveyance executed in that behalf. So that any creditor of the insolvent may get a new assignee appointed; and, as the Act vests all the insolvent's property in the new assignee, without a second assignment being made, it takes away from the representatives of the deceased assignee all power of interfering with the property. The reasoning of Sir John Leach, V. C., in *Loyd* v. *Lander*,(*a*) is very applicable to the present case. His Honor says: "It must be admitted that the real estate of the bankrupt is not formally taken out of him until a bargain and sale is executed; but the effect of the bankrupt laws is immediately to vest the real estate of the bankrupt, potentially, though not formally, in the assignees. They can call for the formal transfer at their pleasure; and the real estate of the bankrupt is as much bound by the contracts of the assignees before the bargain and sale as it is afterwards. Before the bargain and sale, therefore, all beneficial interest is out of the bankrupt, and he differs from every other person who, in form, retains a legal estate; that he has no power of affecting that estate; and that it passes from him, [*104] *not by his own act, but by the act of others, and without his will. Having thus neither interest nor power in the subject of the suit, which requires to be bound by the decree of the Court, it is difficult to conceive any principle upon which he can be considered as a necessary party."

Mr. *Knight Bruce* and Mr. *Anderdon*, in support of the bill, said that the plaintiffs had not gone in and proved under the in-

(*a*) 5 Madd. 282, s. 289.

solvency, and therefore, the section of the Act which had been referred to, did not apply to them.

Mr. *Chandless*, in reply, said that any creditor of the insolvent might apply to the Insolvent Debtor's Court to have a new assignee appointed, whether he had proved under the insolvency or not.

THE VICE-CHANCELLOR:—I do not accede to the objection that has been made to the supplemental bill in this case.

It seems to me that, as a matter of course, all the interest in the property of the insolvent which was vested in the deceased assignee, does, by operation of law, vest in his executors, until a new assignee is appointed; and that, when a new assignee is appointed, all the interest of the executors vests, under the Act, in that new assignee; and if, in the intermediate time, any money, or other property belonging to the insolvent, comes to the hands of the executors, the section of the Act which has been referred to, enables the Insolvent Debtors' Court to order the executors to deliver it up to the new assignee.

*In this case, however, no new assignee has been ap- [*105] pointed; and, as the plaintiffs have not gone in and proved against the insolvent's estate, they are not in a situation to apply to the Insolvent Debtor's Court for the appointment of a new assignee; and, therefore, I think that it was justifiable in them to file the supplemental bill against the executors of the deceased assignee.

Demurrer overruled.

YEWENS *v.* ROBINSON.

1840: July 8th.

An insolvent debtor and his wife conveyed estates, belonging to the latter, to trustees, to raise and pay 35,000*l.* to the insolvent assignees, (who were parties to the deed,) for the benefit of his creditors. The insolvent died before that sum was raised; and, after his death, the assignee made a compromise with his widow, by which they agreed to accept from her a smaller sum. One of the creditors filed a bill against the assignees, the trustees and the widow, charging them with collusion, and praying that the trusts of the conveyance might be performed, and that the defendants might be restrained from carrying the compromise into effect. A demurrer by the assignees, for want of equity, was allowed; as the plaintiff ought to have applied to the Insolvent Debtors' Court to remove the assignees.

IN August, 1835, Sir Thomas Champneys took the benefit of the Act, then in force, for the relief of insolvent debtors. At that time he and Lady Champneys, his wife, were seized, in right of the latter, of estates in Cheshire and other counties, for the life of Lady Champneys. By an indenture dated the 13th of August, 1838, and made between the defendants, Robinson and Gillett, who were the assignees of the insolvent's estate, of the first part, the insolvent and his wife of the second part, Lord Mostyn of the third part, and the defendants, Bateman and Lawrence of the fourth part, after reciting that Lord Mostyn, being desirous of making a contract for the purchase of the before-mentioned estates, (which were comprised in the schedules to the indentures,) had made two proposals for such
[*106] contract; that is to say, *first, he had proposed to pay 35,000*l.* for the purchase of the estate and interest of Sir Thomas Champneys' and his assignees in the premises; and, secondly, as the consideration for the purchase of Lady Champneys' estate and interest, to grant to her a yearly rent-charge of 400*l.* for her separate use, for her life, to be charged on a competent part of the hereditaments comprised in the first schedule to the indenture; and, after further reciting that Lady Champneys was desirous that such contract should be entered into, and was willing to accept Lord Mostyn's second proposal; and that Robinson and Gillett were of opinion that it would be very advan-

tageous to Sir Thomas's creditors, named in the schedule filed by him on his insolvency, to accept Lord Mostyn's first proposal; it was agreed and declared, by and between the parties, that Lord Mostyn contracted to purchase the hereditaments comprised in the first and second schedules to the indenture, for Lady Champneys' life; that Lord Mostyn should, as the consideration for the purchase of the estate and interest of Sir Thomas Champneys and his assignees in the premises, pay 35,000*l.* to Robinson and Gillett; and, as the consideration for the purchase of Lady Champneys' interest should grant to trustees, to be named by her, a rent-charge of 400*l.* a year, for her separate use during her life, to be charged on a competent part of the hereditaments comprised in the first schedule to the indenture; and should also grant to trustees, for her separate use, a lease for 99 years, at a pepper-corn rent, of the hereditaments comprised in the second schedule; that Robinson and Gillett would immediately proceed to take the steps directed to be taken by the Act, 7 G. 4, c. 57, previous to the sale of the real estates of an insolvent debtor, and use their utmost endeavors to obtain the authority required by that Act *to sell their estate and interest in [*107] the hereditaments comprised in the first and second schedules to the indenture; and, if they obtained such authority, would, thereupon, put up such estate and interest to sale by auction, and permit such sale to take place without any reserved price or bidding, except so far as the proposed bidding of 35,000*l.* by Lord Mostyn, might be so deemed; and, if Lord Mostyn should, at any such sale, bid 35,000*l.*, or any higher sum, for such estate and interest, and there should be no higher bidding, then such estate and interest should be knocked down to him; but, if there should be a higher bidding, and Lord Mostyn should not think fit to bid more, then it was agreed that such estate and interest should not be knocked down to him, and he should not be the purchaser thereof, or in any manner bound by any of the covenants or agreements contained in the indenture; and, by the same indenture, Sir Thomas and Lady Champneys conveyed the hereditaments comprised in the first and second schedules thereto to the defendants, Bateman and Law-

rence, and their heirs, for Lady Champneys' life, upon trust that they should, upon the performance, by Lord Mostyn, of the contract thereby entered into by him, convey the same to him and his heirs for Lady Champneys' life.(*a*)

By an indenture bearing even date with, but executed after the before-mentioned indenture, and made between Sir Thomas and Lady Champneys, of the one part, and Robinson and Gillett, of the other part, after reciting, amongst other things, that, in order to secure, to Lady Champneys, a conveyance to
[*108] trustees for her separate *use, of the hereditaments comprised in the second schedule to the first-mentioned indenture, for all the estate and interest of Robinson and Gillett as such assignees as aforesaid therein, and also to prevent any prejudice or loss arising to the creditors of Sir Thomas, named in the schedule filed by him, if he should die in Lady Champneys' lifetime, the parties thereto had agreed to enter into the additional stipulations thereinafter contained: it was agreed and declared, between and by such parties, that, in case the completion of Lord Mostyn's contract should be prevented by the premises intended to be put up to auction being knocked down to any other or higher bidder, Lady Champneys should not be bound to concur in, or do any act to give effect to any conveyance to such other purchaser; but, in that case, her right should remain in the same condition as if the first-mentioned indenture had not been made: but, in case the sale to Lord Mostyn, or any other sale of the premises intended to be put up to auction, should not take place or should not be completed, either by reason of Sir Thomas's death in Lady Champneys' lifetime, or from any other cause, then Robinson and Gillett, and all other necessary parties, should convey the hereditaments comprised in the second schedule to the first mentioned indenture, to two or more trustees, to be nominated by Lady Champneys, in trust for her separate use, during her life, and should convey the hereditaments mentioned in the first schedule to the same indenture, in such

(*a*) The contents of the above deed, and of the one that follows, were correctly taken from the brief with which the reporter was furnished.

manner that the same might be vested in Robinson and Gillett, for Lady Champneys' life, upon trust that they should receive the rents of the same hereditaments until they should have received the sum of 35,000*l.* therefrom, and should then convey the same hereditaments to other trustees, to be named by Lady Champneys, for the then remainder of her life; and that Robinson and Gillett would use their *endeavors to procure Sir Thomas's creditors, whose debts were specified in his schedule and still remained unsatisfied, to ratify and confirm that indenture, and also the one before mentioned. [*109]

The plaintiff was one of the creditors above referred to; and the contents of the two before-mentioned indentures, (which were acknowledged by Lady Champneys, pursuant to the act for abolishing fines and recoveries,) were communicated, by Robinson and Gillett, to the plaintiff, as one of such creditors, and as a person interested under the provisions of those indentures; and he assented to the terms thereof.

Shortly after the execution of those indentures, and upon the faith that the provisions thereof would be carried into effect, Lady Champneys was let into, and had ever since continued in the possession or receipt of the rents of the hereditaments comprised in the second schedule to the first indenture.

In November, 1838, Robinson and Gillett put up to auction the estates and interest agreed to be sold as before-mentioned; and the same were knocked down, not to Lord Mostyn, but to one Wall, for the sum of 50,000*l.* Wall, as it was alleged, was a person without the means of completing, and had refused to complete the purchase, and such purchase had not been and never could be completed.

Sir Thomas Champneys died on the 21st of November, 1839, and Lady Champneys was his sole legal personal representative.

The bill, after stating as above, alleged that the first indenture of the 13th of August, 1838, had *become inoperative, save as to the conveyance thereby made to Bateman and Lawrence; but that the second indenture of the same date, became operative, and that the hereditaments specified in the first schedule to the first indenture, ought to have [*110]

been conveyed, by Bateman and Lawrence, to Robinson and Gillett, for Lady Champneys' life, upon the trusts of the second indenture, under which the plaintiff was interested as a creditor of Sir Thomas Champneys: but that Robinson and Gillett, acting in concert and collusion with Bateman, (who was Lady Champneys' solicitor, and the trustee named in her behalf in the first indenture,) and with Lawrence, (who was the solicitor of Robinson and Gillett,) and also with Lady Champneys, had, (notwithstanding the plaintiff had made to them several applications to have the arrangement, contained in the second indenture, as to the estates mentioned in the first schedule to the first indenture, and as to the rents thereof, carried into effect, and, in the meantime, to have such rents secured,) not only refused so to do, but had permitted Lady Champneys to receive the rents of such estates accrued since Sir Thomas's death, or had permitted Bateman and Lawrence to receive and pay the same to Lady Champneys, instead of receiving and applying the same for the purpose of making up the 35,000*l.*; and that Robinson and Gillett, acting in collusion and concert as aforesaid, had omitted and refused to take any measures to prevent such misapplication of the said rents, or to have the same paid to them or secured; and that they had actually proposed to accept 21,500*l.* from Lady Champneys, in full of the 35,000*l.*; that the plaintiff, as a creditor of Sir Thomas Champneys to a large amount, being greatly interested in having the 35,000*l.* raised under the provisions of the second indenture, had requested Bateman and Lawrence

[*111] not to re-convey to Lady *Champneys, the estates mentioned in the first schedule to the first indenture, until Robinson and Gillett should have fully received the 35,000*l.*, and the plaintiff had given the two last-mentioned parties, as well as Bateman and Lawrence, notice to such effect; but, nevertheless, Robinson and Gillett, acting in concert with Lady Champneys, threatened to accept the 21,500*l.* in full of the 35,000*l.*, and, thereupon, to discharge Lady Champneys and the estates comprised in the first schedule, from the 35,000*l.*; and that Bateman and Lawrence, acting in concert with Robinson and Gillett, and Lady Champneys, threatened to re-convey those estates to her.

1840.—Yewens v. Robinson.

The bill then set forth a letter of the 16th of May, 1840, from Robinson and Gillett's solicitor, to the plaintiff's solicitor, stating that the draft of the re-conveyance of the estates in the first schedule, to Lady Champneys, was prepared and would probably be executed early in the ensuing week, and the contemplated arrangements with Lady Champneys carried into effect; and that nothing short of a rule or order of Court would stop them. The bill then alleged that the defendants at times pretended that Robinson and Gillett were creditors of Sir Thomas Champneys, and that there were other creditors besides them and the plaintiff, (whose names, however, if any such there were, the plaintiff did not know, and the defendants refused to disclose;) and that Robinson and Gillett and such other alleged creditors being, as they pretended, the major part in value, were desirous and had come to some resolution, which had been sanctioned by the Insolvent Debtors' Court, that the proposal made to Lady Champneys, should be adopted; but the plaintiff charged the contrary, and that it was not competent for Robinson and Gillett and such other alleged creditors, if any, or for the Insolvent Debtors' Court, to bind the plaintiff's interest in respect of the *rents receivable under the second indenture, or [*112] to consent to, or sanction or direct that proposal to be carried into effect against the plaintiff's wish; nor had the said Court any jurisdiction over or in respect of such rents, or to secure or apply, or give any directions as to the same; and such Court had, in fact, disavowed and refused to exercise any such jurisdiction: that, under the circumstances aforesaid, the rents of the hereditaments comprised in the first schedule, accrued since Sir Thomas Champneys' death, were in great danger of being, and, in fact, would be lost, unless the Court of Chancery would immediately interfere and grant the relief thereinafter prayed.

The bill prayed that the trusts and agreements of the second indenture of the 13th of August, 1838, might, so far as might be proper, be carried into execution under the direction of the Court; and that Robinson and Gillett might be made answerable for the rents of the estates in the first schedule, accrued since the

death of Sir Thomas Champneys, which had been received by them, or by their order, or for their use, or which they, without wilful default, might have received; and that such rents might be duly applied; and that Robinson and Gillett respectively might be restrained from carrying into effect the arrangement with Lady Champneys, and from releasing her or the last-mentioned estates, from the 35,000*l.*; and that Bateman and Lawrence might be restrained from conveying the same estates, to Lady Champneys, and from conveying or parting with their estate or interest therein otherwise than to Robinson and Gillett in pursuance of the second indenture, and from paying to Lady Champneys, or otherwise than into the Court, to the credit of the cause, the rents of the same estates accrued since the death of Sir Thomas Champneys, which had been [*113] or should be received by Bateman and Lawrence; and that Lady Champneys might be restrained from receiving such rents, and that some person might be appointed to receive the same.

The defendants, Robinson and Gillett, demurred to the bill, on four grounds: first, for want of equity: secondly, because all the creditors of Sir Thomas Champneys, whose names were inserted in the schedule filed by him on his insolvency, ought to have been made parties: thirdly, because the bill ought to have been filed by the plaintiff on behalf of himself and all other such creditors: and fourthly, because a personal representative of Sir Thomas, was not made a party to the bill.

Mr. *Jacob* and Mr. *Chandless*, in support of the demurrer: This Court has no jurisdiction in the present case; but the plaintiff must seek his remedy for the acts which he complains of, in the Insolvent Debtors' Court. That Court has complete power over the assignees of insolvents' estates,(*a*) and, if an assignee will not do his duty, or is acting contrary to his duty, any creditor may apply to that Court, and get him removed. If, therefore, the plaintiff in this case thinks that the assignees have done wrong

(*a*) See 7 Geo. 4, c. 57, s. 35, 36, 37, 38, and 39.

in making the compromise with Lady Champneys, he ought to go to the Insolvent Debtors' Court, and get them discharged. There may be special cases which cannot be investigated before the Insolvent Debtors' Court; but there is no peculiarity in this case. No deed has been executed which has given a right to a third party, who is not subject to the jurisdiction of that court. The object of the bill is to prevent a compromise, alleged to have been made with Lady Champneys, from being carried into effect; but, if *this were a proper case for the in- [*114] terference of a Court of Equity, it is not stated, nor is there anything in the bill, to show that the compromise will be injurious to the insolvent's estate; and, therefore, the fair inference is, that it will be beneficial. The plaintiff does not say that anything will be lost to the estate, but only that the assignees had no right to enter into the compromise, and that the Insolvent Debtors' Court has no power to sanction it, without his consent. It is by no means of course to set aside a compromise made by assignees, though without the consent of the creditors or the sanction of the court. An assignee, as well as an executor, may, by virtue of his office, make a beneficial compromise; and, although the act requires that the assignee shall have the consent of the major part in value of the creditors, and also the sanction of the Court,(*a*) yet that does not take away the power which he has by virtue of his office, but was intended for his protection. At all events, this Court will not entertain a bill to set aside a compromise, which the plaintiff himself does not even allege to be injurious. The allegation of collusion is not specific; and, if it were, it would only afford a ground for applying to the Insolvent Debtors' Court, to remove the assignees. The statement that it was not competent, for the assignees or for the Insolvent Debtors' Court, to bind the plaintiff's interest in respect of the rents receivable under the second indenture, or to sanction or direct the proposal to be carried into effect, is the *gravamen* of the bill; but that is an allegation of matter of law; and, therefore, the demurrer does not admit it. *Hammond* v.

(*a*) See 7 Geo. 4, c. 57, s. 24.

Attwood,(a) *Kaye* v. *Fosbrooke*,(b) *Blue* v. *Marshall*,(c) *Pen-*
[*115] *nington* v. **Healey*,(d) *The Attorney-General* v. *The Mayor and Corporation of Norwich*,(e) *Cawthorn* v. *Chalie*.(g)

Next, it appears, on the face of the bill, that there are unsatisfied creditors of the insolvent besides the plaintiff; they are all interested under the trusts of the second deed of August, 1838, which the bill prays may be carried into effect by the Court; the plaintiff, therefore, ought either to have made all those creditors parties to the bill, or ought to have filed the bill on their behalf as well as his own.

Lastly: no personal representative of Sir Thomas Champneys, is before the Court. He was a party to the deeds of August, 1838; and the plaintiff seems to admit that his personal representative is a necessary party; for he says, in his bill, that Sir T. Champneys died in November, 1839, and that Lady Champneys is his sole legal personal representative. A demurrer admits only facts that are well pleaded: and it is not sufficient to aver that Lady Champneys is Sir Thomas's sole legal personal representative: the plaintiff ought to have stated that she was either his executor or administrator. *Baker* v. *Harwood*.(h)

Mr. *Girdlestone* and Mr. *E. Montagu*, in support of the bill: With respect to the last objection, the demurrer states, not that an executor or administrator, but that a personal representative of Sir Thomas Champneys, is not made a party to the bill; the bill, however, alleges that Lady Champneys is his sole
[*116] legal personal representative; *and, consequently, that allegation is sufficient.

Next: as to the objection that the Insolvent Debtors' Court, and not a Court of Equity, has jurisdiction in the case made by this bill. In the first place, the bill asks that the trusts of a certain deed may be carried into execution, so far as may be

(a) 3 Madd. 158.
(b) Ante, Vol. VIII, p. 28.
(c) 3 P. W. 381.
(d) 1 Crom. & Mees. 402.
(e) 2 Myl. & Cr. 406; see 423.
(g) 2 Sim. & Stu. 127.
(h) Ante, Vol. VII, p. 373.

proper; then it asks that Robinson and Gillett may be restrained from carrying into effect the arrangement with Lady Champneys, and releasing her from the 35,000*l.*; that Bateman and Lawrence, in whom the legal estate is vested, may be restrained from conveying the estates to Lady Champneys, or paying to her, or permitting her to receive the rents of those estates; and that she may be restrained from receiving those rents; and that a receiver of them may be appointed. There can be no doubt that the plaintiff, having an interest in the trusts of the deed, has a right to have those trusts carried into execution; and that he has that right as against the trustees and Lady Champneys. Is not, then, this Court the proper tribunal for the plaintiff to resort to? Is the relief sought, relief which, under any circumstances, could be obtained in the Insolvent Debtors' Court? What jurisdiction has that court over Lady Champneys, or over Bateman and Lawrence, in whom the legal estate is vested, under the first deed of August, 1838, for the purpose of giving effect to a contract entered into by the assignees, for the benefit of the creditors. How could this Court grant the relief asked by this bill in the absence of the assignees? if it could not, they are properly made parties. Besides, the bill charges that they have permitted Lady Champneys to receive the rents; and, therefore, a specific act of collusion is charged. Suppose, for a moment, that the Insolvent *Debtors' Court has jurisdiction in this case, is it not competent to the plaintiff to come to this Court for an injunction, until the question, whether the trusts of the deed ought to be performed or not, is decided?— [*117]

[*The Vice-Chancellor*:—If the assignee of an insolvent is misconducting himself with respect to property vested in him for the benefit of the creditors; as, for instance, if he is about to sell the insolvent's estate to A. for a grossly inadequate price, the Insolvent Debtors' Court will remove him. You say that, because the legal estate is in trustees, and the trustees are going to sell the estate, with the concurrence of the assignees, for a grossly inadequate price, that it is a case for the interference of a Court

of Equity.]—Yes, and the case of *Barton* v. *Jayne*,(a) is an authority for the proposition.—[*The Vice-Chancellor*:—There the assignee had actually assigned the insolvent's property; and the object of the will was to set aside an act that had been actually done. Besides, in that case, the executor, and not the assignee, demurred; the assignee, therefore, did not object to the jurisdiction; but here the assignees do object to the jurisdiction.]—If, as we contend, the bill in this case is maintainable against Lady Champneys and the trustees, but would be demurrable if the assignees were not parties to it, the plaintiff has a right to make them parties. *Kaye* v. *Fosbrooke* is an authority in support of our argument; for, though the demurrer was allowed in that case, yet the principle which we are contending for was, in a great measure, conceded by the Court. There the ground of the decision was, that the facts charged in the bill did not amount to collusion; but, if the Court had been of opinion that, in
[*118] no case, would such a bill be maintained, *it would not have adverted to the special charges in the bill, in order to show that they did not amount to a case of collusion; the ground of the judgment, therefore, supports our proposition that the Court will entertain the suit, if the circumstances of the case are sufficient to make out a case of collusion. In *Benfield* v. *Solomons*,(b) the demurrer was allowed, because there was no allegation of a surplus; but why was that ground taken, if the Court had jurisdiction? We cite that case, more particularly on account of the remark which Lord Eldon makes, in page 86, of the report; where his lordship draws a distinction between the case of a bankrupt suing, and the case of a creditor suing.

This bill charges not only that the Insolvent Debtors' Court has no jurisdiction in this case, but that it has refused to exercise any such jurisdiction.—[*The Vice-Chancellor*:—The charge to which you allude, cannot be taken as a charge that the Insolvent Debtors' Court has refused to exercise its jurisdiction over the assignees. Are you aware of any case in which this Court has interfered, where it has been alleged that the assignee of an in-

(a) Ante, vol. VII. p. 24.

(b) 9 Ves. 77; see. 86.

solvent's estate was acting improperly, and the assignee has demurred to the jurisdiction ?]—It is not competent to the assignee to make that objection, if he is a necessary party to the suit. The ground of the plaintiff's equity in this case is that he has an interest in the trust of the second deed of August, 1838, and that the assignees of the insolvent's estate not only refuse to concur in executing those trusts, but are acting in contravention of those trusts.

*Another objection that has been made to the bill is, [*119] that it does not allege that the agreement which has been entered into with Lady Champneys, is prejudicial to the interest of the plaintiff; but the filing of the bill to have the original agreement carried into execution, renders any express allegation to that effect superfluous. It is incumbent on the defendants to show that the trusts originally declared for the plaintiff's benefit, ought not to be carried into execution, and that the compromise with Lady Champneys ought to be carried into execution.

Next, with respect to the objection that the bill ought to have been filed by the plaintiff on behalf of himself and the other unsatisfied creditors of the insolvent. We contend, first, that, if the plaintiff might have so framed the bill, it was not obligatory upon him to do so; and, secondly, that, according to the doctrine laid down in *Jones* v. *Garcia Del Rio*,(a) this is not a case in which the plaintiff could have so framed his bill; for here there is not such a community of interest as that all the creditors must take either that which the bill asks, or nothing. Some of the creditors may think that the arrangement entered into with Lady Champneys, is more beneficial to them than the original agreement; and may wish to have that arrangement carried into effect, in preference to having the trusts of the second deed of August, 1838, performed.

Lastly, it was said that the other unsatisfied creditors of Sir Thomas Champneys, ought to have been made defendants: but the answer to that objection is that the bill charges that there

(a) Turn. & Russ. 297.

[*120] are no such creditors except *the plaintiff and the defendants, Robinson and Gillett, and that, if there are any such, the plaintiff does not know, and the defendants refuse to disclose their names. *Bowyer* v. *Covert*,(a) *Blain* v. *Agar*.(b)

THE VICE-CHANCELLOR:—This case is plainly distinguishable from the cases which have been cited; because this is a case in which the assignees of the insolvent, are the parties who have demurred to the jurisdiction. In *Barton* v. *Jayne*, and *Benfield* v. *Solomons*, the assignees did not demur; and as long as the parties do not demur, they may be very fairly taken not to object to being made parties. I do not recollect any case in which the assignee of an insolvent or of a bankrupt, has raised an objection to the jurisdiction of this Court, and this Court has upheld its jurisdiction against him.

On looking at this bill, I do not understand that, according to the view which the plaintiff takes of the matter, he at all wishes that these assignees should be removed. The bill asks that Bateman and Lawrence may be restrained from conveying the estates, mentioned in the first schedule to the first indenture of August, 1838, to Lady Champneys, and from parting with their interest in those estates otherwise than to Robinson and Gillett, the assignees; and therefore the objection raised by the bill, is not to their having anything at all to do with the matter, but this part of the bill wishes that they should be the parties who should take the estates. The assignees, however, object to the jurisdiction of this Court.

[*121] *I observe that the prayer asks that the rents and profits, which it seeks to recover, may be duly applied. But that would be interfering with the jurisdiction of the insolvent debtor's court: for, though it may be true, in some sense, that the specific sum of money to be paid out of Lady Champneys' estates, is no part of the assets of Sir Thomas Champneys; yet it is impossible not to see that any right to receive the 35,000*l.* or the 21,500*l.*, arises out of a dealing, by these assignees, with the interest

(a) 1 Vern. 95. (b) Ante, Vol. II, p. 289.

which they had acquired, in right of Sir Thomas Champneys, in the estates of Lady Champneys. A particular arrangement was made, which was, in effect, giving up, to a certain extent, the particular right, whatever that might be, which was derived from Sir Thomas Champneys, in consideration of a certain sum; so that that sum would be assets received by the assignees under the insolvency; and, *prima facie*, that sum would be to be applied and to be accounted for, by the assignees, under the jurisdiction of the insolvent debtors' court.

This bill, then, is filed for the purpose of changing the jurisdiction which, as I understand it, the court of insolvent debtors is competent to exercise, and has not refused to exercise: for the general allegation, in the bill, that the insolvent debtors' court has disavowed and refused to exercise any such jurisdiction, cannot be taken as equivalent to an assertion that the court has refused to exercise its jurisdiction, upon a proper application being made to it. If the bill has stated a particular case, and shown that the insolvent debtors' court either had not jurisdiction or had refused to exercise it, after deliberation, that might be another thing; but, as I understand this passage of the bill, that court has not refused to exercise jurisdiction over the assignees.

*My opinion, then, is, that the true method of pro- [*122] ceeding in this case, would have been to apply to the insolvent debtors' court to have the assignees removed, and others appointed; which, ultimately, would have given the plaintiff all the relief sought by this bill.

It appears to me, that if I were not to allow this demurrer, I should be doing a very dangerous thing, and be opening an avenue by which all the business of the insolvent debtors' court might be removed into this court. I think that this court should be very careful, how it assumes the jurisdiction of a court of common law.

Demurrer allowed.

1840.—Veitch v. Irving.—Harrison v. Dixon.

VEITCH *v.* IRVING.

1840: 17th July.

New security ordered to be given for costs, the surety having become bankrupt.

THE plaintiff had given security for costs. The person who became surety for the costs, afterwards became bankrupt: whereupon the defendant moved that new security might be given.

Mr. *Colvile*, in support of the application, cited *Cliffe* v. *Wilkinson*.(*a*)

Mr. *James*, contra.

THE VICE-CHANCELLOR ordered new security to be given within a certain time, or the bill to be dismissed.(*b*)

[*123] *HARRISON *v.* DIXON.

1840:—16th July.

The defendant being in contempt for want of appearance, the common injunction was extended to stay trial on a motion made without notice.

IN this case, the defendant being in contempt for want of appearance, the *Vice-Chancellor* granted an application made by Mr. *Knight Bruce*, *without notice*, to extend the common injunction to stay trial.

(*a*) Ante, Vol. IV. p. 122.

(*b*) But see ante, Vol. II. p. 570.

1840.—Duncan v. Chamberlayne.

DUNCAN *v.* CHAMBERLAYNE.

1840: 8th and 10th July, and 14th December.

All the assured in the Equitable Assurance Office are partners in the society; and, therefore, express notice of an assignment of a policy effected with that society need not be given, in order to take the policy out of the order and disposition of the assignor.

The Report of *Bozon* v. *Bolland*, in 1 Mont. & Bligh's Reports, corrected.

A LIFE-POLICY which had been effected with the Equitable Assurance Society, was assigned to the plaintiff, as a security for a debt. The assignor afterwards took the benefit of the Insolvent Debtor's Act.

The question was whether notice of the assignment ought not to have been given to the Assurance Society, in order to take the policy out of the order and disposition of the insolvent.

Mr. *Knight Bruce* and Mr. *Dixon* appeared for the plaintiff; and

Mr. *Parker* and Mr. *Taylor* for the defendants.

*In the course of the argument, *Williams* v. *Thorp*,(*a*) [*124] *Ex parte Tennyson*,(*b*) and *Bozon* v. *Bolland*,(*c*) were cited.

THE VICE-CHANCELLOR:—I have had an opportunity of looking at the case of *Bozon* v. *Bolland*, in Reg. Lib. A. 1831, fol. 3155; and I do not think that the short account that is given of that case in Montagu & Bligh's Reports, is sufficient.

The report states that Mr. Joshua Rowe sold an annuity to Mr. Howden; and Rowe covenanted to effect an insurance on his life; which was accordingly effected; but, by mistake, the policy was effected in the name of Richard Creed, a solicitor. That statement, however, is incorrect; for the annuity was secured by bond and warranty of attorney; and there was no covenant by Rowe to effect an insurance on his life; but How-

(*a*) Ante, Vol. II., p. 257. (*b*) 1 Mont. & Bligh, B. C. 67.
(*c*) Ibid. 74, cited.

den wished to have an insurance on his life. Creed, as Howden's agent, by mistake, took the policy in his own name, without stating that he took it as agent to Howden, who had an interest in Rowe's life. At the end of a year, Creed discovered the mistake, and that the policy was void, and requested Rowe to insure his own life at Creed's expense, and assign the policy. Rowe agreed, on condition that Creed should pay the premiums until Rowe should purchase the annuity. The directors of the Equitable Assurance Society granted a new policy, dated the 23d of February, 1814, to Rowe, at Creed's expense, as a substitution for the first; and, by deed of 11th of October, 1815, between Rowe and Creed, Rowe assigned the policy to
[*125] Creed, in *trust for Rowe, if Rowe should repurchase the annuity in his lifetime, according to the condition of the annuity bond; but, if he should not repurchase it, then in trust for the persons entitled by, from, or under Howden; and Creed covenanted to keep up the policy during Rowe's life, or until the repurchase of the annuity. Rowe never repurchased the annuity, but became a bankrupt in 1824, and died in 1828. Creed kept up the policy. The policy never was in Rowe's possession; and, as he did not repurchase the annuity, he was merely a trustee of the policy to secure the annuity to Howden.

In 1819, Howden being then dead, his executors sold and assigned the annuity and their interest in the policy to Marsh. Marsh afterwards assigned the arrears of the annuity due at the time of the assignment to Bozon. Marsh afterwards became bankrupt; and Bozon filed a bill against his assignees, claiming the benefit of the policy, to the extent of the arrears assigned to him.

At the hearing of the cause, before Sir John Leach, Master of the Rolls, a question arose whether the policy was not in Rowe's order and disposition at the time of his bankruptcy; and the cause was ordered to stand over, in order that his assignees might be brought before the court by supplemental bill.(*a*)

(*a*) 1 Russ. & Myl. 69.

A supplemental bill was accordingly filed; and, on the cause again coming on to be heard, it was proved that the policy never had been in Rowe's possession, and that he never had any beneficial interest in it, but *was a trustee of it for [*126] securing the annuity to Howden; and, upon that, the Master of the Rolls held, and held most justly, that the policy was not in Rowe's order and disposition at the time of his bankruptcy.

Nothing turned, in that case, upon notice to the Assurance Society; but this fact came out in the course of the cause, namely, that, prior to 1824, the Equitable Office never took cognizance of assignments of policies, but paid the amount due on each policy to the person having the manual possession of it; and that, since that time, they had taken notice of assignments, and kept a book in which they made minutes of them.

It appears to me, therefore, that the case of *Bozon* v. *Bolland* has nothing to do with either *Williams* v. *Thorp* or *Ex parte Tennyson*; and, therefore, I continue of the same opinion as I expressed in *Williams* v. *Thorp*.

It was afterwards ascertained that, by the constitution of the Equitable Assurance Society, every person who effected an insurance with the society, became, thereby, a partner in it.

THE VICE-CHANCELLOR:—This fact was not brought to the attention of the Court in *Williams* v. *Thorp*, nor was it mentioned when this cause was first before the Court.

The rule is that notice to one partner is notice to the partnership; and, as all insurers in the Equitable Assurance Office, are partners in the society, the fact of the assignment of a policy by one of the assured must *be taken to be a fact [*127] of which the society had notice; and, therefore, I shall direct an account to be taken, in the terms of the prayer of this bill, of what is due on the security of the policy.

Brown v. Bamford.

1842: 27th May.

The form commonly used for restraining married women from disposing of their separate property by anticipation, is insufficient for that purpose. The receipt clause ought to declare that the receipts of the married woman, to be given, from time to time, after the income of the property shall have become due, shall be, and that *no other receipt shall be* sufficient discharges to the trustees.

John Beckett, by his will, dated the 21st of September, 1832, gave certain leasehold houses and stock in the funds to trustees, upon trust, from time to time, during the natural life of his daughter Sophia Bamford, or until she should be duly declared a bankrupt, or take the benefit of any Act passed or to be passed for the relief of Insolvent Debtors, to pay the clear rents, interest, dividends, and proceeds of such leasehold hereditaments, stocks, funds, and securities, unto such person or persons, for such intents and purposes, and in such manner as Sophia Bamford, by any writing or writings under her hand, when and as the same should become due, but not by way of assignment, charge, or other anticipation thereof, should, notwithstanding her then present or any future coverture, direct or appoint; and, in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands, for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband; for which purpose the testator thereby directed that the receipts in writing, under the hand of his daughter, Sophia Bamford, should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, interest,
[*128] *dividends, and proceeds, or so much thereof as should in such receipts respectively be expressed to have been received; and, from and after the decease of his daughter, Sophia Bamford, or such her bankruptcy or insolvency as aforesaid, which should first happen, then in trust for all and every or such one or more of her children as therein mentioned.

1842.—Brown v. Bamford.

After the testator's death, Sophia Bamford, in consideration of the Sunderland Joint Stock Banking Company withdrawing a writ, under which certain goods of Benjamin Parker, her son-in-law, had been taken in execution for a debt due from him to the company, signed a paper in writing, by which she agreed to guarantee the payment of the debt to the company.

In December, 1840, Parker became bankrupt; and no moneys having been paid in reduction of the debt since the guarantee was given, the bill was filed by one of the public officers of the company, against Sophia Bamford and John Bamford, her husband, and the assignee of Parker's estate and the trustees of the will; and, after stating that Sophia Bamford had refused to pay the debt which she had so guaranteed, it alleged that John and Sophia Bamford and the trustees pretended that Sophia Bamford was, by the will, restrained from charging her shares and interests in the dividends, rents, issues, and profits of the trust property, or rendering the same liable for any claim on her, by way of anticipation. Whereas, the plaintiff charged that, according to the true construction of the will, Sophia Bamford had both a restricted power of appointment and the general uncontrolled dominion over the income so bequeathed to her for life as aforesaid; and that, by the *agreement signed [*129] by her as before mentioned, she rendered all the property which she was entitled to, or interested in under the will, liable to the payment of the debt.

The bill prayed that it might be declared that the income which Sophia Bamford was entitled to, under the will, for her separate use, was liable, to the extent of her right in or to the same, to make good and pay the debt to the company.(*a*)

Bamford and wife and the trustees, demurred to the bill for want of equity.

Mr. *Bethell* and Mr. *Baily*, in support of the demurrer:

The question in this case is, whether the proviso against anti-

(*a*) See *Murray* v. *Barlee*, ante, Vol. VII., p. 194; and 3 Myl. & Keen, 209. See also *Owens* v. *Dickenson*, 1 Craig. & Phil. 48.

cipation extends to the life-estate, as it unquestionably does to the power of appointment.

It will be contended by the counsel in support of the bill, that a power to appoint the income of the property is expressly given to Mrs. Bamford, provided she does not anticipate it; and that, under the direction to pay the income into her proper hands for her separate use, she has, by implication, a general [*130] power to dispose of it: and *Barrymore* v. *Ellis*,(a) *will be relied on. But that case is distinguishable from the present; for there the question arose on a deed; here it arises on a will. Here, too, the payment is to cease on Mrs. Bamford becoming either bankrupt or insolvent; and, therefore, it is manifest that the testator intended that the provision which he was making for her should be for her personal, inalienable enjoyment. It is clear that that intention will be defeated if the construction contended for on the other side is to prevail. There is no break in the clause now under consideration: it is one entire sentence. In *Barrymore* v. *Ellis*, your Honor says: "The deed does not say: do and shall pay the same into her own hands, but, simply, to her, for her sole use." But, in this case, the trustees are expressly directed to pay the rents and dividends into the proper hands of Mrs. Bamford; and they are not to be paid except when and as they become due. Then there is a very marked distinction between the receipt clauses in the two cases. In this case, the receipts of Mrs. Bamford are alone made sufficient discharges; but, in the other case, the receipts of Lady Barrymore or of any person or persons to be by her appointed to receive the annuity, are made sufficient discharges. Therefore, we have every requisite in this case, the want of which, in *Barrymore* v. *Ellis*, is assigned as the ground of the decision.

Lastly, the clause in question, is in conformity to established forms and precedents, as will be seen on referring to the form

(a) Ante, Vol. VIII., p. 1. It is settled that a person may have a power over, and also an interest in an estate; but it is not so well established that an express and an implied power can co-exist in the same person, over the same property. Does not the maxim, *expressum facit cessare tacitum*, apply in such a case?

given in 2 Roper, on Husband and Wife, Jacob's edition, page 402.

Mr. *Stuart* and Mr. *Simpson* appeared in support of the bill; but the *Vice-Chancellor* gave judgment without hearing them.

*His Honor, after saying that the words on which the [*131] question arose in this case, were the same, in substance, as the words in *Barrymore* v. *Ellis*, and that he adhered to his decision in that case, proceeded thus:

I admit the common form to be in the terms stated: but it always appeared to me to be defective. When I was in the habit of drawing conveyances, and wished to settle on a lady, property over which she was to have no power of anticipation, I always used to introduce an express proviso that no receipt should be a discharge to the trustees, except a receipt given by the lady for the rents or dividends, (according to the nature of the trust property) then actually become due.

The proviso to which I have alluded, declared, as far as my recollection serves me, that the receipts of the lady, under her own hand, to be given from time to time after the rents or dividends should have actually accrued due, should be, and that no other receipts should be sufficient discharges, to the trustess, for the amount of the moneys therein expressed to be received. In this case, however, there are no negative words in the receipt clause; and, therefore, there is nothing to restrict the power, which Mrs. Bamford had, to dispose of, or charge the rents and dividends of the trust property, under the general direction to pay those rents and dividends to her for her separate use; and the consequence is that the demurrer must be overruled.[1]

[1] There was an appeal in this case to the Lord Chancellor, and the cause was twice argued before him. On the first argument he expressed an opinion in accordance with the Vice-Chancellor, but upon re-argument, he was induced to change his opinion, and held: "It was obviously the intention of the testator that the income of this property should be kept entire, for the use of the daughter, and that it should not be changed or disposed of, except as the successive payments should become due, that it should not in any way be anticipated." He allowed the appeal and the demurrer. *Brown* v. *Bamford*, 1 Phil. R. 621.

[*132] *PRUEN *v.* OSBORNE.—PRUEN *v.* WILCOX.—PRUEN *v.* GILBERT.

1840: 25th July.

Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes. Held, nevertheless, that they were entitled to only one share, each, of the residue.

Testator bequeathed his residue to the children, then living, of T. B. and W. C., and the lawful issue then living of such of their children as were dead, as tenants in common, so nevertheless that such issue should, as amongst themselves, take as tenants in common, and *per stirpes*, and not *per capita*; it being his intention that such issue should have only the shares which their respective parents would have been entitled to, if living. Held that the word "issue," must be taken in the restricted sense of "children."

JOHN WILCOX OSBORNE, by his will dated the 8th of December, 1826, disposed of the residue of the moneys to arise from the sale of his real and personal estate, in the following words:

"And as to all the rest and residue of the moneys to arise from the sale or sales hereinbefore directed, and all other the before-mentioned moneys, trust moneys, and premises respectively, and all the before-mentioned investments, subject to the trusts aforesaid, I will, declare and direct that they, the said William Ashmead Pruen and Edward Wells Oldaker, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall stand possessed thereof and interested therein, in trust for, and to pay and divide the same respectively, and every part thereof respectively, and I give and bequeath the same unto, between and amongst all and every the children of the brothers and sisters of my uncle, John Wilcox's late father, and all and every the children of the brothers and sisters of the said John Wilcox's late mother, and all and every the children of Thomas Burton, who is mentioned in the will of the said John Wilcox, and all and every the children of William Coles, (who is also mentioned in the said will,) by the

[*133] said John Wilcox's *late father's sister, and the said John Wilcox's cousins, William Wilcox and Mary Bur-

ton, who are both also mentioned in the said will, or such of the said several children and cousins respectively as are now living, and the lawful issue now living of such of them as are dead leaving lawful issue of his, her, or their body or bodies, in equal parts, shares, and proportions as tenants in common; so, nevertheless, that the issue of any such children and cousins respectively as are dead, shall, as between or amongst themselves, take as tenants in common, and *per stirpes* and not *per capita;* it being my intention that such *issue* respectively shall have only the share or shares to which his, her, or their respective *parent or parents* would have been entitled to, if living, under or by virtue of this my will."

The testator died on the 12th of December, 1826.

It appeared, from the report made in pursuance of the decree at the hearing of the cause, that Thomas Burton married a sister of the father of John Wilcox, the testator's uncle, and had issue by her a daughter, Louisa, who was born at the date of the testator's will, and was still living; and that William Coles married another sister of John Wilcox's father, and had issue by her three children, William, Mary, and Hannah; and that they also were born at the date of the will, and were still living; and that William Wilcox, who was named in the will and therein described as a cousin of John Wilcox, was a son of a brother of John Wilcox's father, and was still living.

On the cause coming on to be heard for further directions, one question was, whether Louisa Burton was not entitled to a share of the testator's residuary estate, as *a child [*134] of Thomas Burton, and to another share as a child of a sister of John Wilcox's father. A similar question arose with respect to William, Mary, and Hannah Coles and William Wilcox; the three first of those persons being not only children of William Coles, but also of a sister of John Wilcox's father, and the last being expressly named as a legatee in the will, and being also a child of a brother of John Wilcox's father.

It was contended, by Mr. *Jacob*, Mr. *G. Richards*, and Mr. *Anderson*, that the testator's object was to give a double benefit

to such of the parties as were members of two of the classes of legatees mentioned in the will.

The *Vice-Chancellor*, however, held that, although they were twice described in the will, yet they were entitled to only one share, each, of the residuary estate.

Another and the principal question was whether the word "issue" was use by the testator in its natural sense, or as designating *children* only.

Mr. *Girdlestone*, Mr. *Koe*, and Mr. *P. White* contended that the word "issue" must be taken to mean "children" only, as the testator had used that word in connection with the word "parent;" and that effect could not be given to the direction that the issue should have only the share or shares to which his, her, or their parent or parents would have been entitled to, if living, unless the word "issue" was taken in that restricted sense. *Sibley* v. *Perry*.(*a*)

[*135] *Mr. *Knight Bruce* and Mr. *Tennant*, for the defendants, W. D. Giles and Mary Giles, who were the great grand-children and only issue living at the date of the will of a sister of John Wilcox's father, said:

The case of *Sibley* v. *Perry*, when rightly understood, is no authority for construing this will. The word "issue" means, naturally, all descendants; but as it may be held, if the context requires it, to mean children only; so the word "parent," if the context requires it, may be taken to mean any lineal ancestor. The rule of construction cannot be applied to the one word, without admitting it to be equally applicable to the other. In *Sibley* v. *Perry*, Lord Eldon says: "Upon all the cases, this word, (issue,) *prima facie*, will take in descendants beyond immediate issue. But, on the other hand, there is no denying (not applying to the state of the fund or the number of persons) that

(*a*) 7 Ves. 252.

if, upon fair reasoning deduced from the words of the will, all the contents and the design and tenor of it, as manifested by its contents, show it was meant in the more restrained sense, that sense may be given to it. The clauses of this will to which I have referred, show the testator was likely to use the words 'lawful issue' as descriptive of children only; and the question is, whether, upon the whole will taken together, he did not use them in that sense. Cases of this kind, considering the precedent authorities, ought not to pass without observation. This decision is not right, unless upon the construction furnished by the different parts of the will." Then his lordship, at the conclusion of his judgment, says: "I shall express the ground of my opinion in the declaration. Declare that, upon the construction of this will and the whole of it taken together, the testator, by the words 'lawful issue' in these clauses, meant *children; and the distribution shall be accordingly."(*a*) [*136] If the testator, in the present case, had said, merely: "and the lawful issue now living of such of them as are dead leaving lawful issue of his, her, or their body or bodies, in equal parts, shares, and proportions, as tenants in common;" then this case would have resembled the case of *Sibley* v. *Perry*. The testator, however, goes on to say: "So, nevertheless, that the issue of any such children and cousins respectively as are dead, shall, as between and amongst themselves, take as tenants in common, and *per stirpes* and not *per capita*." But, in *Sibley* v. *Perry*, there were no words denoting any intention to give the property *per stirpes*. The only resemblance between that case and the present, consists in the word "parent" being found in both. That case has no resemblance to the present; and all that it establishes is, that the word "issue" may be held to mean "children," if the general tenor of the will requires it. There is another very striking reason, in this case, for giving to the word "issue" its natural import. The gift is not to issue, generally, but to the issue *now living*; the testator, therefore, had particular persons in his view; and the direction that the issue should

(*a*) See 7 Ves. 531, 532, 533.

take *per stirpes*, would let in the individuals for whom we appear; whereas, the construction contended for on the other side, will exclude every member of the family to which those parties belong, from participating in the residue; and, if there had been no other claimants, that construction would have caused an intestacy.

Mr. *Simons* and Mr. *Bird* appeared for the other parties.

[*137] *THE VICE-CHANCELLOR:—I think that the great grand-children are excluded.

In the first place, the gift is to the children of the brothers and sisters of John Wilcox's late father, and to the children of the brothers and sisters of his late mother, and to the children of certain individuals whose names are mentioned, or to such of the said several children as are now living, and the lawful issue now living of such of them as are dead. Under those words John Giles, who was the father of the claimants and the grandson of a sister of John Wilcox's father, and who was dead at the date of the will, never could have taken. Then the testator directs that the issue of such of the children as were dead, should take only the share to which their parent would have been entitled if living. There is a difficulty, therefore, in making the children of John Giles take, when John Giles himself never could have taken. The substituted gift is only to the issue of children of certain persons; and John Giles not being a child of any of them, his issue are not pointed at. So that, on the very face of the will, there is no gift to the children of John Giles.

Moreover, I am of opinion that, if there be nothing more, in a will or other written instrument whereby to construe the term "issue," than a direction that the issue are to take the shares of their parents, that is enough to confine the general meaning of the word "issue" to the particular meaning of "children" of that parent; and it was so held in *Leigh* v. *Norbury*.(a)

In *Sibley* v. *Perry*, Lord Eldon put the same construction on

(a) 13 Ves. 340.

the word "issue," because he found that, in a *particu- [*138]
lar clause, the use of the word "parent," restricted the meaning of the word "issue."

And the same construction was adopted in a case which came before Sir William Grant, at the Rolls, on the 2d of March. 1814.(*a*) There, by an indenture, a fund was declared to be in trust for the children of a marriage living at the death of the husband and wife; and the deed then provided that, if any should die in the lifetime of the husband and wife leaving issue, such issue should take such share as their parent would have been entitled to in case he or she had survived the husband and wife. A grand-child of a child of the marriage was excluded.

Therefore, I have always considered it as settled, that, in a will or in a deed, if it is a question whether the word "issue" shall be taken generally or in a restricted sense, a direction that the issue shall take only the shares which their parents would have taken if living, must be taken to show that the word "issue" was used in its restricted sense.

"This Court doth declare that the several persons by the said Master's separate report in the said first-mentioned cause, dated the 26th day of July, 1830, and the said Master's general report in the said two first-mentioned causes, dated the 14th day of April, 1840, and the sixth schedule to such general report, found to have been children of brothers or sisters of the testator's uncle John Wilcox's late father, or of brothers or sisters of the said testator's uncle John Wilcox's late mother, and to have been living at the testator's decease, *became, upon such [*139]
decease, entitled respectively to vested interests in equal 27th parts of the testator's residuary estate; and that the several persons by the same reports and schedule found to have been living at the decease of the said testator, and to have been children of any such children as aforesaid as had died in the lifetime of the testator leaving issue, became, upon the said testator's decease, entitled, as to each class of such children, to vested in-

(*a*) *Harrington* v. *Laurence*, not reported.

terests, as tenants in common, in one equal 27th part of the said residuary estate."

GLYN *v.* DUESBURY.

1840: 29th July.

A., an architect and surveyor, brought an action against B., his employer, for 155*l.* the amount of a running account between them; one item of which was 76*l.*, which A. had paid to D. by the direction of C., to whom it was due for plumber's work done for B. C. having taken the benefit of the Insolvent Debtors' Act, his assignee demanded the 76*l.* of B., insisting that the payment to D. was invalid. B. paid into court, in the action, 79*l.*, being the 155*l.* minus 76*l.* A. took the 79*l.* out of court, and proceeded with his action. B. then filed a bill of interpleader against A. and C.'s assignee, respecting the 76*l.* Held, that the bill was not sustainable.

THE bill stated that the plaintiff, having occasion to build a new house at Ewell in Surrey, employed the defendant, Duesbury, as his architect and surveyor; that S. B. Haynes entered into a contract with Duesbury, as the architect or agent of the plaintiff, to do the plumber's, painter's, and glazier's work of the house; that Haynes accordingly proceeded with the work comprised in the contract, and that all such work had been done and completed; that, according to the terms of the contract, the work was to be paid for as it proceeded, and, accordingly, sums of money were, from time to time, paid by the plaintiff, on the certificate and authority of Duesbury, and otherwise to
[*140] Haynes for and on account of *the work so done by him; and, after deducting and giving credit for the sums so paid to him, there became and was, at the commencement of the action after-mentioned, due from the plaintiff, in respect of the work contracted to be done by Haynes, 98*l.* 1*s.* 0 1-2*d.*; that, in August, 1839, and pending the completion of the work, Haynes took the benefit of the Insolvent Debtors' Act, and the defendant, Obbard, was appointed assignee of his estate; that, in June,

1839, and during the progress of the work, Duesbury, at Haynes's request, accepted, and paid when it became due, a bill of exchange, dated the 13th of June, 1839, and payable six months after date, for 92*l.* 7*s.* 2*d.*, being the balance which Haynes claimed to be then due to him from the plaintiff, in respect of the work; that Duesbury alleged that certain parts of the work contracted to be done by Haynes, had, by reason of Haynes's default therein, been actually done by him, Duesbury, and, on that ground, he claimed to have some portion of the balance of 98*l.* 1*s.* 0 1-2*d.* paid to him by the plaintiff; that Duesbury also alleged that the amount of the acceptance so given by him as aforesaid, was, in fact, more, by the sum of 16*l.*, than was really and justly due to Haynes, and that consequently, the sum of 76*l.* 7*s.* 2*d.* only was so due, and was the utmost amount claimable, in respect of the matters in question, by Obbard as Haynes's assignee; that Obbard, as such assignee, disputed the validity of the alleged transfer or assignment to Rose of the debt due to Haynes from the plaintiff, and insisted that, notwithstanding the acceptance alleged to have been given and paid by Duesbury, he, Obbard, was entitled to have the 76*l.* 7*s.* 2*d.* paid to him by the plaintiff; and that, in manner aforesaid, conflicting claims had arisen and still subsisted between the two defendants, in respect of the 76*l.* 7*s.* 2*d.*, as the balance remaining due and *owing from the plaintiff, on account of the work [*141] so actually done by Haynes for the plaintiff; that, by reason of such conflicting claims to the last-mentioned balance, the plaintiff did not know to which of the two defendants he could safely pay the same; but he was ready to pay the same into court, in order that the defendants might interplead and settle their claims amongst themselves; that, save as thereinafter mentioned, there was a balance of 57*l.* 9*s.* due from the plaintiff to Duesbury, as such surveyor and architect as aforesaid, on the balance of the account between them, exclusive of the balance due from the plaintiff, for the work contracted to be done by Haynes; that Duesbury had commenced an action in the Court of Queen's Bench against the plaintiff; and, by the particulars of demand therein, he claimed the 57*l.* 9*s.*, the balance

due to him as such surveyor and architect as aforesaid from the plaintiff, and the further sum of 98*l.* 1*s.* 0 1-2*d.*, for plumbing, painting, and other work, (making together 155*l.* 10*s.* 0 1-2*d.*,) and he claimed 92*l.* 7*s.* 2*d.*, parcel of such last-mentioned sum, as money paid for the plaintiff's use; that the 98*l.* 1*s.* 0 1-2*d.* mentioned in the particulars of demand, was the same sum as the balance of that amount thereinbefore mentioned to be due from the plaintiff, for the work contracted to be done by Haynes; and that the 92*l.* 7*s.* 2*d.* was the sum which Duesbury alleged that he gave such acceptance for and paid, as before mentioned; that the action was still pending, and the plaintiff had pleaded thereto, and had paid into court, in the action, 79*l.* 2*s.* 10 1-2*d.*, which included the 57*l.* 9*s.* due to Duesbury as aforesaid, and also the whole balance due from the plaintiff, on account of the work contracted to be done by Haynes, exclusive of 76*l.* 7*s.* 2*d.*,

[*142] being that portion of such last-mentioned balance as was claimed *by Obbard, as such assignee as aforesaid, to be due and payable to him; and that the plaintiff had pleaded to the action, *non assumpsit* except as to 79*l.* 2*s.* 10 1-2*d.*, and that, as to that sum, Duesbury ought not further to maintain his action, because the plaintiff had brought it into court, and Duesbury had not sustained damages to a greater amount; that Duesbury had replied to those pleas by joining issue on the first, and taking out of court the 79*l.* 2*s.* 10 1-2*d.*, in discharge, so far, of the action; that the 79*l.* 2s. 10 1-2*d.* was the full amount claimed by Duesbury by his particulars of demand, exclusive only of the 76*l.* 7*s.* 2*d.*, which was the subject of the conflicting claims between him and Obbard; and the right to such sum, as between those parties, could not be tried or decided in the action; but, nevertheless, Duesbury insisted upon the payment to him of such disputed sum, and had given notice of trial for the next Kingston assizes; and Obbard threatened to bring an action against the plaintiff for the 76*l.* 7*s.* 2*d.*, as the balance due to him from the plaintiff, on account of the work contracted to be done by Haynes; that Duesbury wrote two letters, one to the plaintiff, dated the 13th of June, 1839, and the other to the plaintiff's solicitor, dated the 19th of July

following, relating to the matters aforesaid, the first of which was as follows: "Dear Sir:—In consequence of your letter to the party in the Blackfriars-road, concerning Haynes, the plumber, stating he must refer to myself as the person through whose hands all payments on the contract for your house at Ewell are to be made, I have accepted a bill drawn upon me for the balance due to him from you, as he, Haynes, has been suddenly involved in difficulties, and particularly wished to make the money immediately available; and I write this to particularly request of you, on no account, to pay any money on that contract without previously *informing me on the subject. I shall, [*143] I believe, have the pleasure of seeing you next week, when I can explain the affair to you. The chief point is this, that, as I am to receive this money for Haynes from you, I have made myself responsible for it to the parties who wrote to you on the subject, at the urgent request of Haynes; as it will do him a great service. I remain, &c., Henry Duesbury. P. S.—Pray be kind enough not to pay any moneys, either on the contract or extras, of any description, till I have seen you." The other letter was as follows: "I do not know whether you were able to explain to Mr. Rose that, through the false statements and accounts of Haynes, I certified that 92*l.* 7*s.* 2*d.* was due to him on the contract. But I have since heard (as I believe was explained to you the other day) that he has received 16*l.* more than he said he had; leaving only 76*l.* 7*s.* 2*d.* as the balance; but even this is not due to him on the contract, as the work is left incomplete. However, I consider the value of the extra work performed would finish the work on the contract, and leave the entire sum due, for Haynes's work of every description, 76*l.* 7*s.* 2*d.* You will naturally ask why I suffered myself to be involved in a transaction of this nature. The state of the case is simply this: Haynes came to me saying he was under temporary difficulty, but that if I would certify to his friend, Mr. Rose, that so much was due to him for work performed at Mr. Glyn's house at Ewell, said Rose would advance the money, and entirely release him from embarrassments. He told me how much he had received, (which was a false statement,) and I certified for the

balance; this was 92*l.* 7*s.* 2*d.* Some time after, Rose called upon me expressing sorrow for Haynes, and giving me to understand he was about to assist him, but said there was no other
[*144] *terms upon which he could advance the money but by my giving him a bill for the amount of Haynes's balance. I objected for some time; but, as I considered he did not know me, and wished to make it imperative on me to pay him the money, as I was certain to receive it according to Mr. Glyn's letter to him, and as I had always heard Haynes highly spoken of as an honest man, Rose himself holding the same language, but, above all, as I was particularly anxious nothing disagreeable should occur to Mr. Glyn in the completion of his house, I consented to give a bill for six months, making quite sure that, long before that time, everything would be satisfactorily concluded. I trust you will excuse my troubling you with this communication, and ask Mr. Glyn to be kind enough to give it his early attention. I am, &c., Henry Duesbury."

The bill prayed that the defendants might severally set forth to which of them the 76*l.* 7*s.* 2*d.* belonged and was payable, and how in particular they made out their claims thereto; and that they might interplead and settle and adjust their demands between themselves; the plaintiff being desirous and thereby offering that the 76*l.* 7*s.* 2*d.* should be paid to such of them to whom the same should, in the judgment of the Court, appear of right to belong; and that the plaintiff might be at liberty to pay the last-mentoned sum into court, for the benefit of such of the defendants as should appear to be entitled thereto, and that Duesbury might be restrained from all further proceedings in his action; and that both the defendants might be restrained from commencing or prosecuting any other action or actions against the plaintiff, for the recovery of the 76*l.* 7*s.* 2*d.*, or touching any of the matters aforesaid.

[*145] *The injunction having been obtained *ex parte*, the defendants now moved to dissolve it, on the coming in of their answers.

Mr. *Knight Bruce* and Mr. *Norton* in support of the motion:

1840.—Glyn v. Duesbury.

This is not a case of interpleader: for there is no identity of subject, nor is there any right to make the defendants interplead with each other. The subject of Obbard's claim, is a debt due from the plaintiff to Haynes; and the subject of the action brought by Duesbury, is the balance of a running account, between him and the plaintiff, consisting of various items, one of which is a sum of money which Duesbury had paid to, or on account of Haynes, on the plaintiff's account; and, consequently, there is no common subject of litigation between Duesbury and Obbard. *Crawshay* v. *Thornton*,(a) *Dungey* v. *Angove*,(b) *Wright* v. *Ward*.(c)

Mr. *Jacob* and Mr. *Rogers*, for the plaintiff: The money having been paid into court, the defendants have no right to call on the court to decide whether this case is a case of interpleader or not; for Lord Eldon decided, in *Hyde* v. *Warren*,(d) that the money being brought into court, the bill could not be demurred to as not being a bill of interpleader.—[THE VICE-CHANCELLOR: No such point was decided, by Lord Eldon, in *Hyde* v. *Warren*.]—The two defendants in this case, are, in point of fact, claiming the very same sum of money. Duesbury claims as having *paid the money to, or on the account of Haynes as [*146] the agent of the plaintiff; and Obbard says that the money was not paid by Duesbury as the agent of the plaintiff.

The case of *Crawshay* v. *Thornton*, was a case of an entirely different character from the present. There both parties might have been entitled to recover from the plaintiff; and the demurrer was allowed on the ground that Crawshay had acknowledged himself to be the agent of Thornton, and, therefore, by his own act, he had placed himself in a situation which made him liable to Thornton at all events; and, besides, he might be liable to Daniloff also: but, in this case, if Obbard's claim succeeds, the plaintiff cannot be liable to pay Duesbury; and, if Duesbury succeeds in his action, the plaintiff cannot be compelled to pay

(a) Ante, Vol. VII. p. 391; and 2 Myl. & Cr. 1. See p. 29.
(b) 2 Ves. jun. 304.
(c) 4 Russ. 215.
(d) 19 Ves. 322.

Obbard. This, therefore, is a proper case of interpleader. The defendants' counsel assume the very point on which the right to make their clients interplead depends. They say that Duesbury paid Haynes, as the agent of the plaintiff; but the truth is that Duesbury says one thing, and Obbard says the contrary: for Duesbury says that he paid Haynes, as the agent of the plaintiff; and Obbard says that Duesbury did not pay Haynes as the agent of the plaintiff.

Mr. *Knight Bruce*, in reply: If A. orders goods from a shop, which are delivered to him, and then the owner of an adjoining shop says that he furnished the goods, and claims to be paid for them: that does not make a case of interpleader. The mere assertion of a false claim does not create a case of interpleader. If Obbard, under an assignment made to him by Duesbury, had claimed the debt due from the plaintiff, that might have [*147] been a case of interpleader. *So, also, if Duesbury had claimed the debt due from the plaintiff to his tradesman, it might have been a case of interpleader. But the present case cannot be held to be a case of interpleader, unless the court is prepared to say that, if a tradesman brings an action for his bill against his customer, the customer may refuse to pay the bill on the ground that his agent had had the money to pay it with, and it was an item in a disputed account between him and his agent. What right has the customer to bring the tradesman into conflict with his agent? The question at issue is whether the debt which was due to Haynes, is extinguished or not: the plaintiff says that it is; but Obbard says that it is not. The balance due to Duesbury is not claimed by Obbard; and, therefore, there is no identity of debt or duty in this case.

THE VICE-CHANCELLOR: I do not recollect that, when this case was first brought before me upon the motion for the injunction, anything more took place than an *ex parte* statement of the case, upon which the order was made without discussion: therefore I am not sorry that there has been this discussion; because it may serve to make clear the law of interpleader.

1840.—Glyn v. Duesbury.

In the case of *Crawshay* v. *Thornton*, the Lord Chancellor, speaking of the law of interpleader, uses this language: "In equity, it is defined to be, where two or more persons claim the same debt or duty." It is obvious that there may be a case of interpleader where no debt or duty is claimed. Lord Redesdale, in his treatise on pleading, twice asserts the proposition, that, where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought, of right, *to render a [*148] debt of duty or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them: p. 48, 4th edition. And again, at p. 141, he says that, where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him.

A case of interpleader then arises where the same subject, whether debt, duty or thing is claimed. Now, when the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to identity of matter. But, where the subject in dispute is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they never can be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient, of itself, to determine the identity; for the amount may be the same, and the debt may be different.

In this case, Haynes having become insolvent, Obbard, as his assignee, claims a debt due for work and labor done by him for the plaintiff: and Duesbury, who was the plaintiff's agent, and who superintended the works, claims a debt due to him from the plaintiff in respect of his having paid certain moneys on the plaintiff's account, amongst which is included a sum paid, by him, to, or on account of Haynes, for work and labor done; and the question is, whether the debt or duty claimed by Duesbury, is the same as that claimed by Obbard. *It [*149]

appears to me that, although there is a complication of circumstances which, *prima facie*, give color to the assertion that the two sums are, substantially, the same debt; yet, if Duesbury had brought an action against the plaintiff, and had, in that action, recovered the whole amount of what he claimed, that would not have prevented Obbard, in right of Haynes, from bringing his action and recovering, even although the amounts might be the same. Suppose that Duesbury's claim of debt had originally arisen from one set of circumstances, and Obbard's claim from another source, could the plaintiff, by paying the debt to Duesbury, be morally and conscientiously said to have paid the debt due to Haynes; or, *vice versa*, if he had paid Haynes, might not Duesbury have recovered?

The matter, I think, must depend on the original nature and constitution of the debt: and when the debt to Duesbury arose in respect of acts done by him in his character of architect and surveyor to the plaintiff, and the debt to Haynes, in respect of work and labor done; I do not see how the two debts can be the same. It seems to me that they are originally and substantially different in their nature: and, therefore, that they cannot be properly made the subject of a bill of interpleader. The consequence is that the injunction must be dissolved.

[*150] *BLEAKLEY *v.* SMITH.

1840: 17th July.

J. R. Bridges, having five freehold houses, but no other property, in Cable-street, Liverpool, agreed to sell them to J. Bleakley, for 248*l.*; and, thereupon, drew up the following memorandum in his own hand-writing: "July 26th, 1839.—John Bleakley agrees with J. R. Bridges, to take the property in Cable-street, for the net sum of 248*l.* 10*s.*" Held that the agreement was sufficiently signed by the vendor.

JOHN ROBERT BRIDGES being seised, in fee, of an undivided moiety of five freehold houses in Cable-street, Liverpool, agreed to sell it, to the plaintiff, for £248 10*s.*; and thereupon, Bridges

drew up the following memorandum, in his own hand-writing: "July 26th, 1839—John Bleakley agrees, with J. R. Bridges, to take the property in Cable-street, for the net sum of £248 10s."

Bridges had no property in Cable-street, except the undivded moiety before mentioned. On the 10th of February, 1840, he died, having received the whole of the purchase money, but without having conveyed the property to the plaintiff.

The bill was filed, against his executors and his heir at law, (who was an infant,) for a specific performance of the agreement.

Bridges not having written his name either at the foot of the agreement or in any other part of it except as appears above, the question was whether the agreement was binding on him and his heir.

Mr. *F. J. Hall*, for the plaintiff, cited *Propert* v. *Parker*.(*a*)

Mr, *James Russell*, for the defendants.

*THE VICE-CHANCELLOR was of opinion that the [*151] agreement was sufficiently signed to take it out of the Statute of Frauds, and decreed as follows:

"This court doth declare that the memorandum or agreement in the pleadings mentioned, dated the 26th day of July, 1839, was a valid and binding contract in writing, as against J. R. Bridges, deceased, in the pleadings named, and that the same ought to be specifically performed and carried into execution; and doth order and decree the same accordingly: and the defendants John Smith and Alice Bridges, the executor and executrix of the said J. R. Bridges, by their answer admitting that the consideration or purchase money, for the undivided moiety or equal half part of the said J. R. Bridges, deceased, of and in the five several freehold messuages and dwelling-houses, with the appurtenances, situate on the south side of Cable-street in the town of Liverpool in the county of Lancaster, was fully paid and satisfied by

(*a*) 1 Russ. & Myl. 625. See 1 Sudg. Vend. & Pur. 10th edit. 179.

the plaintiff to the said J. R. Bridges in his lifetime, this Court doth declare that the infant defendant T. S. Bridges, the eldest son and heir-at-law of the said J. R. Bridges, is a trustee of the same undivided moiety or equal half part of and in the said five several freehold messuages or dwelling-houses and appurtenances, within the intent and meaning of an Act of Parliament made and passed, &c., (1 Will. 4, c. 60,) and that the said infant defendant is such trustee for the plaintiff, his heirs and assigns: and it is ordered that the infant defendant T. S. Bridges, and all other proper parties, do execute a proper conveyance or assurance of the said undivided moiety or equal half part of the said five freehold messuages, dwelling-houses and appurtenances to the plaintiff," &c., &c.

[*152] *FORBES *v.* PEACOCK.

1840: 1st August.

Testator, after directing all his just debts to be paid, gave his personal estate and a freehold house, of which he was seised in fee, to his wife for life, with liberty to sell it, in case a good offer should be made, and to invest the proceeds, in the funds, for her benefit during her life; and he directed that, at his wife's death, the house, if not previously sold, should be sold, (but without saying by whom,) and that the proceeds, together with his personal estate, should be divided amongst the chidren of his brother and sister: and he appointed his wife, his executrix, and requested J. H. F. and R. C., jointly with her, to become the executors and trustees of his will. J. H. F. and the testator's widow, proved the will. R. C. died in the lifetime of J. H. F., and the widow, without having proved it. The widow died 25 years after the testator. Held that J. H. F. had power to sell the house, and to give a receipt for the purchase-money.

J. F. THROCKMORTON being seised in fee of a messuage, garden and other hereditaments in Hornsey-lane, Middlesex, made his will, dated the 18th of March, 1815, in the following words:

"All my just debts to be paid, and all my debts due to me to be collected. First, I give and bequeath, to my dear wife Elizabeth Throckmorton, all plate, jewels, wines, household fur-

niture, moneys at the banker's or elsewhere belonging to me, and all stock in the funds, partly during her natural life, and partly at her own disposal, as shall hereinafter be provided for. Secondly, in order that she my said dear wife Elizabeth Throckmorton may have wherewithal to support herself comfortably, I wish her to lay out, in government annuities, for her life, £2,500 sterling, half in the consols, and half in the reduced three per cents., which will bring her payments in quarterly. The remainder of my property I desire may be invested in the five per cent., stock, for her benefit, during her natural life. Thirdly, the house and ground on which it stands, garden and all thereto belonging, being now my own freehold property paid
*for and without incumbrance, I give to her for her na- [*153]
tural life, with liberty to sell it, in case a good offer is made, and invest the proceeds of it in the five per cent. stock for her benefit during her life; or she may let it on a running lease for 7, 14 or 21 years; said lease to expire and terminate on the first of the three above said periods that may happen subsequent to her demise. Out of my estate, the moneys so directed to be invested as aforesaid, or any part thereof, I give and bequeath, at the death of my dear wife Elizabeth Throckmorton, to Mary May, great niece of my said dear wife Elizabeth Throckmorton, provided she conducts herself, as she has always hitherto done, to her aunt's and my satisfaction, £1,000, for her sole use and benefit; and also the interest of £1,000 five per cent. stock, during her, the said Mary May's, natural life. Fourthly, should the aforesaid Mary May die before her aunt Elizabeth Throckmorton, then the £1,000 left as above for her sole use and benefit, is to be with the rest of my remaining property to form a residuary trust fund to be disposed of as hereinafter to be named at the death of my aforesaid dear wife Elizabeth Throckmorton: but in case of her, the said Mary May's decease as aforesaid before that of her aunt Elizabeth Throckmorton, then, and in that case only, I give, at the death of Elizabeth Throckmorton, the interest of the £1,000 five per cent. stock spoken of as aforesaid, to Mary Graham and Eliza Graham, daughters of my late good friend and brother-in-law Joseph Graham of Harwich, jointly and

equally, or to the survivor of them during their lives, and, at their deaths, to be divided with the residuary property as above spoken of and to be hereinafter provided for. Fifthly, I desire, that, at the death of my said dear wife Elizabeth Throckmorton, the residue of my estate may then be collected, includ-
[*154] ing the profits of *the house and lot, if not previously sold, to be then disposed of to good advantage, and divided as follows: my sister, Sarah Fordman, of Freehold, Monmouth County, State of New Jersey in America, has four children, and my brother Samuel Throckmorton, deceased, has left three children, perhaps four, but to them, be they seven or be they eight, I give and bequeath all the said residue of my property as aforementioned, to be equally divided share and share alike, or to the survivors of them. Sixthly, on the decease of the aforesaid Mary May or of Mary Graham and Eliza Graham, whichever or whoever of them shall have the benefit and receive the interest of the £1,000 five per cent. stock as aforesaid, the principal is then to revert to the residuary funds as aforesaid, and to be divided therewith. Seventhly, whatever property may be willed to me by my dear mother Catherine Throckmorton, or by whomsoever, I give it to my aforesaid dear wife, Elizabeth Throckmorton, during her life, and, at her death, to form part of the residuary fund as before mentioned, and to be divided, at her death, with the same. I appoint my dear wife, Elizabeth Throckmorton, to be my executrix; and I request the favor of my good friends, John Hopton Forbes, Esq., of Ely Place, Holborn, and Robert Cooper, Esq., of Guilfdord-street, will, jointly with my aforesaid dear wife, Elizabeth Throckmorton, become my executors and trustees to this my will." The testator then gave legacies of ten guineas each to several individuals; and afterwards proceeded thus:—" My brother, Richard Throckmorton, enjoys a property in which I am interested, or may be so on the decease of my mother: it is not my wish that he should be distressed or urged to pay my demand upon him during his life or that of his present wife, but, at their decease, if my wife, Eliza-
[*155] beth Throckmorton, is *then living, I give it to her for her life, and, at her decease, to form part of the residu-

ary funds as aforesaid, to be applied as directed in the fifth clause of this my will. I desire a copy of this my will to be sent to my sister, Sarah Fordman, wife of Dr. Fordman, Freehold Monmouth County, New Jersey, America."

The testatator died soon after the date of his will, which was proved by his widow, Elizabeth Throckmorton, and by the plaintiff, John Hopton Forbes. R. Cooper died many years before the bill was filed, without having proved the will or acted in the trusts thereof. Elizabeth Throckmorton died on the 7th of April 1840.

The bill stated that, in pursuance of the will, the plaintiff caused the said messuage, garden, and hereditaments to be put up to sale by auction on the 28th of May, 1840; and that the defendant became the purchaser thereof at the price of 1,360*l.*: that an abstract of title to the premises was delivered, to the defendant, on the plaintiff's behalf, and was submitted, by the defendant, to his counsel, whose opinion thereon was as follows: "I think a good title is deduced to the late Mr. Throckmorton. The real difficulty in the title arises under the will of Mr. Throckmorton, on which three distinct questions present themselves. Firstly, whether a power of sale can, by implication, be held to be vested in his executors. Secondly, whether a surviving executor and trustee can sell: and 3dly, whether a good discharge can be given without the concurrence of the *cestuis que trust.* On the whole, there appears to me so much doubt on the title, that a purchaser ought, I think, to have the sanction of a decree of a court of equity: or otherwise, I think that the vendor should obtain the concurrence of the testator's heir and of the parties beneficially entitled to the purchase money."

*The bill further alleged that, save as to the aforesaid [*156] questions arising on the testator's will, the title to the premises, as disclosed by the abstract, was a perfectly good and marketable title: that the plaintiff could not procure and was not bound to procure the concurrence, in the sale and conveyance of the premises, of the testator's heir and all the parties beneficially interested in his residuary estate, most of whom were resident abroad in different parts of the world: but the plaintiff was ad-

vised that he, as the surviving executor and trustee of the will, had power to sell the premises, and to make a good title thereto, and convey the same to the defendant and give him a valid discharge for his purchase-money, without the concurrence of such parties or any of them.

The bill prayed for a specific performance of the contract.

The defendant demurred on the ground that the plaintiff could not make a good title to the premises.

Mr. *Coote* and Mr. *Bird*, in support of the demurrer: The question in this case arises on the fifth clause in the will, where the testator directs that, at the death of his wife, the residue of his estate shall be collected, including the profits of the house and lot; if not previously sold, to be then disposed of to good advantage, and divided as therein mentioned. We contend that the plaintiff, as the surviving executor of the will, is not enabled to make a title to the house. It will be said, by the counsel in support of the bill, that the plaintiff has a right to sell the house, either to pay the testator's debts, which are charged, by his will, on his real estate, or to pay the legacies; or because the produce of the real estate and the personal estate, are blended together [*157] *and are to be disposed of by the executors, as in *Tylden* v. *Hyde*.(a) We concede that, if no person is appointed to sell the real estate, and the proceeds are to pass through the hands of the executor, for the purpose of paying debts or legacies, then the executor is the person to sell the real estate: but, here, twenty-five years have elapsed since the testator's death, and, therefore, the executor is not at liberty to allege that he is under the necessity of selling the real estate to pay the testator's debts. At all events, he ought to have stated, in his bill, that he wanted money to pay the debts. *Shaw* v. *Borrer*.(b)

Secondly, as to the money being wanted to pay the legacy to Mary May. It is pretty clear that the £2,500 directed to be invested in the government annuities, is the fund out of which the testator intended that legacy to be paid.

Thirdly, with respect to the argument, founded on the decision

(a) 2 Sim. & Stu. 238. (b) 1 Keen, 559.

in *Tylden* v. *Hyde*, that, as the produce of the real estate is blended with the personalty, and the aggregate fund is to be divided by the executor, therefore, the executor is to sell.—[Mr. *Knight Bruce*, for the bill: You do not allude to the request that the plaintiff and Cooper, should become the executors and trustees of the will.]—The £2,500 is the fund of which they are to be trustees. In *Tylden* v. *Hyde*, Sir John Leach, V. C., says: "Where there is a general direction to sell, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors." It is not, however, very intelligible why a power to sell real estate should not be implied to the heir rather than to *the [*158] executor. This case, however, is distinguishable from *Tylden* v. *Hyde*, and falls rather within the principle of *Bentham* v. *Wiltshire*.(a) There the testator devised the estate to which the suit related, to Hannah Barrett for her life, provided she did not marry; and directed that, after her decease, it should be sold, (not saying by whom,) and the moneys arising therefrom divided amongst certain illegitimate children: and he appointed Bryan Bentham and Hannah Barrett, his executors. The difficulty in that case, was that, as the real estate was not to be sold until after the death of Hannah Barrett, the tenant for life, and, as she was an executrix, it was necessary to imply a power of sale, not only in the executors, but in the surviving executor; and Sir John Leach, in his judgment in that case, says: "It is a further circumstance that the sale is directed to be made after the death of the tenant for life, who was one of the executors: there is here, therefore, no power of sale in the executors." If then, it is held that the plaintiff in this case has power to sell the property in question, the decision in *Bentham* v. *Wiltshire* will be contradicted.

Supposing that a power to sell is vested, by implication, in the plaintiff, still, as the sale cannot be required for the purpose of paying the debts of the testator, who died 25 years ago, the plaintiff can-

(a) 4 Madd. 44.

not give a receipt for the purchase-money, without the concurrence of the *cestuis que trust.* The plaintiff, however, has sold the property without their knowledge; and he does not know who they are or where they reside. The probability is that they, or some of them at least, are aliens; consequently, the attorney-general ought to have been made a party to this suit, as represent-
[*159] ing the crown. **Doe* v. *Acklam.*(*a*)—[THE VICE-CHANCELLOR: Is there any allegation that they are aliens?]—No: but there appears, on the face of the will, strong ground for presuming that they are so.—[Mr. *Knight Bruce:* Are you aware that, in *Du Hourmelin* v. *Sheldon,*(*b*) the Lord-Chancellor decided that aliens might take the proceeds of the sale of real estate?]—At all events, all the *cestuis que trust* may have died in the lifetime of the testator's widow; and then the object of the sale would be at an end.

Mr. *Knight Bruce* and Mr. *J. Parker* appeared in support of the bill: but

THE VICE-CHANCELLOR, (without hearing them,) said: The testator directs that, at the death of his widow, the residue of his estate shall be collected, including the proceeds of his house, which, if not previously sold, is to be then sold. He then says: "My sister Sarah Fordman, of Freehold, Monmouth county, State of New Jersey, in America, has four children, and my brother, Samuel Throckmorton, deceased, has left three children, perhaps four; but to them, be they seven or be they eight, I give and bequeath all the said residue of my property as aforementioned, to be equally divided, share and share alike, or to the survivors of them." He seems, therefore, to be doubtful how many children of his deceased brother were living. Therefore, when he says: "or to the survivors of them," he means not those who should be living at the decease of his widow, but those who should be living at his own decease.

When this case was opened, it brought to my recollection a

(*a*) 2 Barn. & Cress. 779. (*b*) 4 Myl. & Cr. 525.

note, which I made some years ago, of a very remarkable *case: *Ward* v. *Devon*, 9th February, 1805.[1] [*160] There a testator made his will, dated the 29th of August, 1801, in the following words:

"Sell all off, both real and personal property, and divide the produce between my wife, Mary Ann Ward, and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son: but it is my will to sell all. I appoint Mr. Robert Ward, my brother, and my wife, Mary Ann Ward, my executors." That was the whole of the will.

The testator died seised in fee of freeholds and copyholds. The executors contracted to sell to the defendant, who insisted that they could not make a title: but it was held that the executors had power to sell.(*a*) On the authority of that case, I am of opinion that the plaintiff has power to sell the house which is the subject of the present suit.

The only other question is, whether the plaintiff can give a valid receipt for the purchase-money: and I am of opinion that he can do so; for the testator has charged his real estate with the payment of his debts; and, as the bill says nothing at all about the debts, *non constat* but that some of them may still remain unpaid. At all events, the purchaser has no notice that they have been all paid: and he is not bound to inquire whether they have been paid or not.

Demurrer overruled.

[1] See *Curtis* v. *Fulbrook*, 8 Hare, 29; 12 Sim. 536.

(*a*) It appeared, from the note of the above case, which His Honor kindly lent to the Reporter, that Devon stated, in his answer, that he had taken the opinion of the late Mr. Shadwell on the question; and that that eminent conveyancer doubted whether the executors could sell.

[*161] *MARRIS *v.* BURTON.

1840: 24th July.

Testator directed his executors to set apart a sum, not more than £7,500, the dividends of which, when invested as after directed, would amount to or produce the clear yearly sum of £300, clear of all deductions whatsoever, and to invest the sum so to be set apart, in Government or other securities; and he directed that if, at any time, the dividends of the trust monies should, from any cause whatsoever, prove insufficient to answer the purposes aforesaid, the trustees should, out of the residue of the moneys that should come to their hands, raise such further sum as should be sufficient to make good any deficiency, and apply the same accordingly: and he gave the annuity to the plaintiff for life. Held that the annuity was free from legacy-duty.

THE testator in the cause directed his executors and trustees to set apart, out of the residue of his personal estate and the proceeds of his real estate, a sum of money, not being less than £6,500, nor more than £7,500, the yearly dividends, interest and produce of which, when invested as thereinafter mentioned, would amount to or produce the clear yearly sum of £300, clear of all deductions whatsoever, and to lay out and invest the said sum so to be set apart, in their names, in Government or other securities: and he gave the annuity to the plaintiff for her life. The testator then directed that if, at any time, the dividends and annual produce of the trust moneys should, from any
[*162] cause *whatsoever, prove insufficient to answer and satisfy the purposes aforesaid, his trustees should, by and out of the residue of the moneys which should come to their hands, raise such further sum or sums of money as should be sufficient to make good any deficiency, and pay and apply the same accordingly.

The question was whether the annuity was given free of legacy-duty.

Mr. *Knight Bruce* and Mr. *Bacon*, for the plaintiff, the annuitant, cited *Smith* v. *Anderson*(*a*) and *Barksdale* v. *Gilliat*.(*b*)

(*a*) 4 Russ. 352.

(*b*) 1 Swanst. 562.

1842.—Marris v. Burton.

Mr. *Jacob* and Mr. *Walker*, for the executors and trustees:—This case is distinguishable from the cases cited; for, there, the annuity itself was given clear of all deductions; but here the fund that is to produce the annuity, and not the annuity, is so given. Besides, the sum that is to be invested is limited; it is not to exceed £7,500. But that sum, if invested in the Three per Cents., would not produce even the annuity. Can you then say that a much larger sum than the testator has directed, that is, a sum sufficient to pay the legacy duty as well as the annuity, ought to be taken out of the residue?

The testator contemplated that the money directed to be set apart, might be invested in the Three and a Half per Cents., and that the dividends of that stock might be reduced; and it is in that event, that he directs the deficiency to be made good. *Sanders* v. *Kiddell* (*c*)

*THE VICE-CHANCELLOR:—The testator has pointed [163] out a clear intention that the annuity should be clear of all deductions. In *Sanders* v. *Kiddell* the testator did, indeed, use the word "clear," but he did not use the words "clear of all deductions;" and, besides, the parties were to take the annuity in succession. Here it is pretty plain from the words to which I have adverted and from the other parts of the will, that the testator intended the annuitant to take the annuity free from any diminution whatever.

(*a*) Ante, Vol. VII. p. 536.

DANIEL *v.* DUDLEY.

1840: 31st July.

By a marriage settlement, trusts were declared of a sum of money, the wife's property, for her separate use for life, for her husband for life, for their children as the wife should by deed or will appoint; in default of appointment, for the children equally; if there should be no child, then for such persons as the wife should appoint by deed or will, and, in default thereof, for the executors or administrators of the wife. The ultimate trust took effect. Held that, by the executors or administrators of the wife, her next of kin at her death, were meant, there being, throughout the settlement, an evident intention to exclude the husband from taking more than a life interest.

BY an indenture dated the 27th of May, 1807, being the settlement made in contemplation of the marriage of Thomas Busby with Mary Henn, after reciting the intended marriage, and that, as well in prospect thereof as of the portion which T. Busby would receive with Mary Henn, and for making a better provision for T. Busby and Mary Henn and the issue of the marriage, it had been agreed that the sum of 1,100*l.*, secured by the mortgage therein mentioned, should be settled upon and for the trusts, intents and purposes, and subject to the powers, provisions and agreements thereinafter mentioned concerning the same; [*164] it was *witnessed that, in pursuance of such agreement and for the consideration aforesaid, Mary Henn, for herself, her heirs, executors, &c., and Thomas Busby, for himself, his heirs, executors, &c., did severally covenant, with John Land and Solomon Bowerman, that, immediately after the execution of the settlement, the 1,100*l.* should be and be deemed as vested in Land and Bowerman; and Land and Bowerman did thereby, for themselves severally and for their several executors, &c., declare that they would stand possessed thereof and of the interest, dividends and produce thereof, in trust, after the solemnization of the marriage, to continue the same or any part thereof, on the then present security at interest, or with the consent of Mary Henn, testified by some writing under her hand, and, after her decease, at the discretion of the trustees for the time being, to call in the 1,100*l.* or any part thereof, and lay out or lend the

same again, in the names of the trustees for the time being, in the purchase of some of the public stocks or funds, or upon some government or parliamentary or real security or securities at interest, and the same again, with such consent as aforesaid, or at the discretion of the trustees for the time being after Mary Henn's decease, from time to time to alter, vary, transfer, sell out or call in, and lay out and invest upon any new or other stocks, funds or securities of the like nature: and, during Mary Henn's life, to receive the dividends, &c., of the 1,100*l.*, or of the stocks, &c., upon which the same should then be lent, laid out or invested, and to pay such dividends, &c., to Mary Henn for her separate use; and, after her decease, in case Thomas Busby should survive her, to pay the dividends, &c., to him, for his life; and, after the decease of the survivor of them, to stand possessed of the capital in trust for all and every or such one or more of the children of the marriage as Mary Henn *should, by deed or will, appoint, and, in default of [*165] such appointment, in trust to divide the same equally amongst all the children of the marriage, the shares of sons to be paid to them at twenty-one, and the shares of daughters at that age or on marriage. The settlement then contained provisions for the maintenance of the children, and for the survivorship and accruer of their shares in case they should die before their shares should become payable. It then directed that, in case there should be no son who should attain 21, nor any daughter who should attain that age or marry, the trustees should pay and transfer the 1,100*l.*, or the stocks, &c., upon which that sum should then be invested, to such person or persons, &c., as Mary Henn, notwithstanding her coverture, should appoint by deed or will; and that, in default of such appointment, the trustees should pay and transfer the same unto the executors or administrators of Mary Henn: and Busby covenanted, with the trustees, that, in case the marriage should take effect and Mary Henn should die in his lifetime, he would permit and suffer her to appoint the 1,100*l.* by deed or will, unto such child or children, person or persons, in such shares, manner and form as she should think proper; and that, in case she should die in his life-

time and should make no appointment of all or any part of the 1,100*l.*, and she dying without issue as aforesaid, the same, or the unappointed part thereof, should be and remain unto and for the only use and benefit of her executors, administrators and assigns; and Thomas Busby further covenanted, with the trustees, that, if the marriage should take effect, he would permit the will, to be made by Mary Henn in pursuance of the before-mentioned power, to be duly proved by the executors [*166] therein to be named and probate *thereof to be taken, as was usual; and that the appointees should peaceably and quietly have, hold and possess the 1,100*l.*, without any let, &c., of or by him, his executors, administrators or assigns: and also that it should be lawful for the trustees to sue for the 1,100*l.* or any part thereof, or the interest or dividends thereof, in his name and in the name of Mary Henn; and that he would not release the 1,100*l.*, or any part thereof, or the interest or dividends thereof then due or thereafter to grow due to Mary Henn, without the consent in writing of the trustees; and that he would, as often as thereto desired by the trustees, join with Mary Henn in any release, receipt or discharges necessary to be given for any moneys due or to grow due to her as aforesaid; and that he would at all times after the marriage should take effect, upon every reasonable request and at the proper costs and charges of the trustees,(*a*) or the survivor of them, or the executors or administrators of the survivor, do and execute all such further acts and things for the better settling, recovering and receiving the 1,100*l.* and the interest and dividends thereof, upon and for the trusts and intents thereinbefore declared concerning the same, as by the trustees and the survivor of them, or the executors or administrators of the survivor, or by their counsel, should be reasonably required: and it was thereby agreed between the parties thereto that Busby, his executors and administrators, should, at all times thereafter, be indemnified, out of the trust premises, against all costs, charges, &c., that he or they should incur by reason of the said Thomas Busby joining or being made a party

(*a*) So in brief.

in any action or suit for recovering any part of the 1,100*l.*, or the dividends or interest thereof, or on any other account whatsoever.

*The marriage was solemnised shortly after the execution of the settlement. [*167]

In September, 1819, Busby took the benefit of the Insolvent Debtors' Act; and the defendant, Dudley, became the assignee of his estate. Mary Busby received the interest of the 1,100*l.* during her life for her separate use. She died in May, 1823, intestate, leaving her husband and a son, who was the only issue of the marriage and her sole next of kin, her surviving.

After Mrs. Busby's death, the interest of the 1,100*l.* was paid to Mr. Busby's assignee during his life. In 1825 he died intestate, without having taken out administration to his wife, and leaving his son, his only child and next of kin, him surviving.

In January, 1829, the son died an infant, intestate and unmarried, leaving the plaintiff Charlotte Daniel and the defendant Martha Goodson, his two paternal aunts, his sole next of kin. The interest which became due on the 1,100*l.* from Thomas Busby's death up to the 24th of September, 1828, was applied for the infant's use, but the interest which accrued subsequently to that day and up to the infant's death, was in arrear at his decease.

In February, 1834, administration to the estates of Thomas Busby and his infant son was granted to the plaintiff, Charlotte Daniel; and, in April 1835, administration to Mary Busby was granted to the same person.

The plaintiff, who had obtained payment of the 1,100*l.* and the interest due thereon from the mortgagee, alleged, by *her bill, that Dudley, as the assignee under Busby's insolvency, insisted that Busby became entitled to the 1,100*l.* and all interest due thereon, at the death of his infant son, and also to all interest accrued thereon subsequently, as having survived his wife; and that the plaintiff ought to pay the same to Dudley as such assignee: whereas the defendant Martha Goodson, as one of the infant's next of kin, alleged that, according to the true construction of the settlement, Busby was excluded [*168]

from taking, in the events which had happened, any benefit in the 1,100*l.* or the interest thereof, under the ultimate trust declared by the settlement for the benefit of Mary Busby's executors and administrators, such trust being meant, as Martha Goodson contended, for the benefit of Mary Busby's next of kin, to the total exclusion of her husband surviving her; and that Busby was bound, by his covenants in the settlement, to give effect to such settlement accordingly; and that the plaintiff, as his administratrix, was then bound so to do; and that Martha Goodson accordingly insisted that the infant, as Mary Busby's only child and sole next of kin, became entitled to the 1,100*l.* and the interest thereof, subject to his father's life interest and to his own contingent interest therein, and that, on the infant's decease, the 1,100*l.* and all interest due thereon, devolved to his next of kin, and that Martha Goodson, accordingly, became entitled to one moiety of the trust money, as one of his next of kin at the time of his death, and that the plaintiff Charlotte Daniel became entitled to the other moiety, as the other of such next of kin, and that she, as the infant's administratrix, was bound to pay and divide the trust money accordingly. The bill further alleged that Martha Goodson also insisted that, if Busby was not excluded by the settlement as before mentioned, yet that [*169] *the interest of the 1,100*l.* which accrued after Busby's death and in the lifetime of his son, and which remained unpaid at his decease, formed personal estate of the son, and, as such, became and was divisible amongst his next of kin.

The bill prayed that the rights and interests of the defendants and of the plaintiff in the moneys received by the plaintiff on account of the 1,100*l.* and interest, might be ascertained and declared; and that such moneys might be paid and applied accordingly; and, in the meantime, that the same might be secured for the benefit of the parties interested therein; and that all such accounts might be taken and inquiries made, as might be necessary for the purposes aforesaid.

The defendant, Dudley, by his answer, claimed, as Busby's assignee, all such right and interest in the matters in question, in trust and for the benefit of Busby's creditors, as he might ap-

pear to be entitled to. The other defendants were Henry Goodson and Martha his wife, neither of whom answered the bill. With respect to the latter, the bill charged, and Dudley admitted, in his answer, that she separated from her husband many years ago and went to America, where she was still resident. With respect to the former, the bill charged that the plaintiff had not seen or heard of him, and that he had not been seen or heard of by any other person since 1835, and that the plaintiff was unable to discover whether he was living or dead; in answer to which, Dudley said he believed that the plaintiff had not seen or heard of H. Goodson since 1835; but whether any other person had seen or heard of him since that time, the defendant was unable to set forth.

*The cause now came on to be heard as a short cause. [*170]

Mr. *Knight Bruce*, and Mr. *Parry*, for the plaintiff: The question is, whether, according to the true construction of the settlement, the executors or administrators of the wife, do not mean her next of kin.

There is a covenant, following the trust for the executors or administrators of the wife, which will be found material to the construction of those words. The husband covenants that in case his wife should die in his lifetime without making any appointment of the 1,100*l.* and without issue, that sum should be and remain unto and for the only use and benefit of her executors, administrators and assigns. So that he provides for the case of her dying under such circumstances that no one could take except himself. *Bulmer* v. *Jay*.(a) That case was not so strong in favor of the next of kin, as the present is: for there the 750*l.* was to be raised after the death of the survivor of the husband and wife, whichever of them might be the survivor. In that case, your Honor said: "I apprehend that, in putting a construction on the expression, 'the executors and administrators of Ann Prichard,' I ought not to look at those words only, but at the whole of the settlement, in order to discover

(a) Ante, Vol. IV. p. 48.

what the intention of the parties was in using that expression; for, to adopt the language of Lord Thurlow, in *Woodcock* v. *The Duke of Dorset*, the intention of the settlement is the truth and honor of the case." So, in deciding as to the construction of the words in question in this case, we submit that the court [*171] is bound to look at the whole of the settlement; and *it will then be seen that the property is the property of the wife: that the husband is anxiously excluded from taking any interest in it beyond a life interest; that he is to have no power to appoint the fund, nor even any control over the securities in which it is to be invested; and that there is that important covenant entered into by him, to which we have before alluded. Your Honor's decision in *Bulmer* v. *Jay*, was affirmed by Lord Brougham, C.:(*a*) his lordship, in his judgment, uses language which closely applies to the present case. He says: "Now if it had been intended that the husband should take, or, after him, his personal representatives, can anything be more strange and unintelligible than that this roundabout method of giving the money to him should have been adopted? Instead of saying, 'to the husband, his executors and administrators,' it is, that he shall take through the executor of the will, or the administrator to the estate and effects."

"How can one suppose the design to have been that he and his representatives should take, when, instead of giving the fund to them, the settlement gives it to the executors or administrators of his wife? No doubt he is entitled to it if those executors or administrators are to administer the estate and effects according to the law of distribution. But is not this a most extraordinary and roundabout way of giving it to him? Hence we are not only naturally led, but compelled to find some other meaning for the words. Then it is to be considered that nothing can be more likely than that the parties to the settlement should intend to give this sum, which formed originally a part of the wife's estate, and was by her brought into the settle- [*172] ment, to the *family of the wife. It is set apart, as

(*a*) 3 Myl. & Keen, 197; see 201.

it were, for her—she is to have, by express provision in terms, the absolute disposal of it. In whole or in part, she may appoint to it, by deed in writing or will, notwithstanding her coverture; and it is only in the event of her having failed to dispose of it, that the clause in question assumes to deal with it at all. All this clearly shows that the sum is set apart for her and hers. If, 'executors or administrators' are to be taken in the ordinary sense of the words, it is set apart for her, if she chooses to appoint by deed or will; but otherwise not at all,—it falls at once to her husband."

The case of *Smith* v. *Dudley*,(*a*) is also a very strong authority for putting such a construction on the words, executors or administrators, as the intention of the parties, as it is to be collected from the instrument, requires: for there your Honor put one construction on those words in one part of the settlement, and a different construction on them in another part of it. Your Honor, towards the conclusion of your judgment, says: "The next subjects of the settlement are the household furniture and Mary Pountney's interest under Mrs. Pitt's will; and, with respect to them, the ulimate limitation is the same as the corresponding limitation of the leaseholds. Now, as the leaseholds and the household furniture were the property of Barnsley and wife, and the share of Mrs. Pitt's estate was the property of Mary Pountney herself, it is fair to put such a construction upon the foolish words which are found in the ultimate limitations of trust as to them, as will have the effect of restoring them to Mary Pountney's own family." In the present case also the fund in *question was the property of the wife, and, [*173] therefore, it is fair to put such a construction upon the ultimate limitation of trust, as will have the effect of restoring it to her family.

Mr. *Jacob* and Mr. *Keene*, for the defendant Dudley:—In *Bulmer* v. *Jay*, the 750*l.* was to be raised out of the husband's property; therefore, it was obvious that he was intended to be ex-

(*a*) Ante, Vol. IX. p. 125; see 133.

cluded. Lord Brougham relies on that circumstance in his judgment. His Lordship says: "The provision, in the settlement, that, if the real estate on which the 750*l.* were to be raised, should prove insufficient, the husband's estate should bear the deficiency, makes it more difficult to suppose that the husband is to benefit by that sum, as he must do if executors or administrators be taken in the ordinary sense of those words. According to the construction contended for, it would be provided that the husband's estate should be charged with a sum to be paid to the wife's representatives, in order that they might pay it over to the husband himself or his representatives; a kind of arrangement which, it may be safely asserted, no persons, with their eyes open, ever made." It has been said that the court ought to put such a construction upon an instrument as the truth and honor of the case requires. Here, if the construction contended for on the other side, is to prevail, the fund would not have become the property of the wife if she had survived her husband. Is such a construction consistent with the truth and honor of the settlement?

In *Smith* v. *Dudley* there were special words which do not occur in the present case: for the words, "of her own family," were added to the limitation to the *executors or administrators of the wife: and, consequently, there was plainly, an indication of intention in favor of her own relations; and, that being so, it was impossible to let in the husband. Here the limitations are the common ones: first, to the wife for life, then to the husband for life, then to the children, and ultimately to the executors or administrators of the settlor.

[*174]

The covenants in the settlement do not tend, in the least, to support the plaintiff's argument. They are merely covenants, on the part of the husband, to give effect to the limitations of the settlement, and were quite superfluous. Upon the whole we submit that there is nothing whatever to show that the words under consideration, ought to be taken out of their natural meaning.

Mr. *Knight Bruce*, in reply:—If the fund was intended to be-

come the wife's absolute property in case she survived her husband, that is, if the words, "the executors or administrators of Mary Henn," were intended to have their natural effect, the general power of appointment given to her would, in that event, be nugatory.

One of the covenants entered into by the husband, is that if his wife should die in his lifetime, without issue and without making any appointment, then the 1,100*l.* should remain for the only use and benefit of her executors, administrators and assigns, that is, according to the defendant's construction, that if the property should come to be his, it should remain to his own use and benefit: such a construction is manifestly absurd. Besides, executors and administrators do not take for their own use and benefit; and it is plain that the parties *when [*175] they used those words, had in view some persons who would take for their own benefit. It is only reasonable to conclude, that the covenants were entered into by the husband, in order to prevent him from claiming any interest in the settled property, except that which was expressly limited to him. Lastly, it appears from the covenants, that the instrument in question was intended to be executory, or in the nature of marriage articles: and, therefore, the court is not under the same obligation as it was in all the cases that have been cited, to give to the words their natural and legal effect; but it is at liberty to put such a construction upon them as, regard being had to the nature and object of the instrument, the parties may be reasonably supposed to have intended.

THE VICE-CHANCELLOR:—I have read through the whole of this settlement in order to see what the parties have *bona fide* expressed. One thing is marked, and that is, the total exclusion of the husband from any power or control over the property, or any interest in it except that which is expressly given to him for his life. The wife alone is to consent to the change of securities; and the powers to dispose of the fund and to appoint new trustees of the settlement are, expressly, confined to her.(*a*)

(*a*) The power to appoint new trustees was omitted in the bill.

Then there is a covenant that the husband will, at the request, and at the proper costs and charges of the trustees, make, do and execute all such further acts and things for the better settling, recovering and receiving the 1,100*l.* upon the trust, and to and for the intents and purposes thereinbefore expressed, as, by the trustees or their counsel, shall be required. I can-
[*176] not, therefore, *but think that, to a certain extent, the parties considered this instrument not to be a complete settlement: and, if the court had been called upon to make a settlement, the question would have been whether something else was not meant than is expressed.

The first covenant is that, in case the marriage should take effect and the wife should die in the lifetime of her husband, it should be lawful, for the wife, to appoint the 1,100*l.*, either by deed or will, unto such child or children, &c., as she should think proper; but, if she should make no such appointment, and should die without issue, then that the 1,100*l.* should be and remain unto, and for the only use and benefit of her executors, administrators and assigns: so that the husband covenants that, if his wife should die in his lifetime (in which case she could make no assignment or other disposition of the 1,100*l.* except by an execution of the power,) and also that, if she should not execute the power, then that the 1,100*l.* shall be, and remain for the use and benefit of her assigns; that is, that, if she shall make no assignment, it shall go to her assigns. It is manifest from this covenant, and also from other parts of the settlement, that it was prepared by an unskilful hand: and as there is a plain intention, throughout the settlement, to exclude the husband from taking any interest in the settled property except that which is, expressly, given to him, the words, "the executors or administrators of Mary Henn," ought not to be construed so as to give to her husband that property from which it is plain that it was the intention of the parties to exclude him. And my opinion is that the reasonable construction of those words is that they mean the next of kin of the wife living at her death.

[*177] *The plaintiffs appealed to the Lord Chancellor,

from the above decision. The appeal was heard on the 16th of January, 1841. At the conclusion of the argument, his Lordship said:

"I shall look into the cases before I decide this case: but I feel very great difficulty as to what I can do with it in its present state. It is said that Martha Goodson, the wife of the defendant Henry Goodson, is out of the jurisdiction; but there is no proof of it. Then it is alleged that her husband has not been heard of for several years; but, for aught I know to the contrary, he may be in court this very morning.

"Then there is another difficulty. The plaintiff represents Thomas Busby, his wife and child; but, in the state of the suit with respect to parties, I cannot decide in which character the plaintiff holds the fund in dispute; whether she holds it as the representative of Mr. Busby, of his wife, or of their child. I cannot assume that there was only one child of the marriage, nor can I assume that the persons who are named as parties to this record are the sole next of kin of Mrs. Busby. The plaintiff certainly states that she and Mrs. Goodson are the sole next of kin of Mrs. Busby, and that Mrs. Goodson is out of the jurisdiction, and that Mr. Goodson has not been heard of; but a plaintiff can admit nothing as against absent parties: nor can I, in the absence of parties interested, decide, upon the application of a plaintiff who represents three estates, which of those estates is entitled to the property in dispute.

"A creditor of Mr. Busby ought to be brought before the Court. Mr. Dudley may be a creditor; but he is a defendant, and is before the Court, not in the character of a creditor, *but as assignee under the insolvency. If a bill [*178] were to be filed by a creditor of Mr. Busby, bringing Mr. Dudley and the plaintiff before the Court, then I could decide the question. But, what with those who are out of the jurisdiction, and those who cannot be found, and those who can be found but are not here, I do not see how it is possible to go on.

"I shall look into the cases before I finally dispose of this

case; and, when I find that the suit is in such a state as to have a decree made in it, I shall dispose of it."(a)[1]

In re Taylor.

1840 : 27th & 28th July, and 1st August.

The father of infants, before a petition was presented, by their mother, for access to them, &c., under 2 & 3 Vict. c. 54, went, with them, to reside abroad. The court ordered substituted service of the petition, but, at the hearing, declined to make the order (although the father had filed affidavits and appeared by counsel,) because the father and infants were resident abroad, and because a suit, by the mother, for restitution of conjugal rights, was pending, which, if successful, would have the same effect as the order prayed.

The court will not make the order, where the wife has left her husband without sufficient cause.

Semble, that the order may be made *ex parte*, if the necessity of the case requires it.

The petition in this case, was presented under 2 & 3 Vict. c. 54, (to amend the law relating to the custody of infants.)

The *Vice-Chancellor* having held that he had jurisdiction to make an order under the Act,(a) the petition now came [*179] *on to be heard. The material facts of the case were as follows:

Mrs. Taylor, the petitioner, was married to her husband, Mr. J. D. Taylor, in 1829. At the time of presenting the petition there were living five children of the marriage, two of whom, a son and a daughter, were more than seven years old, but the other three were under that age. The youngest child, a son, was born on the 23d of May, 1837.

The Act under which the petition was presented received the royal assent on the 17th of August, 1839. Before that time, Mr.

(a) A compromise took place, in consequence of the above observations.

[1] This case is reported on the appeal, 1 Phil. 1. The case as there reported differs somewhat from the statement in this case.

(b) See *ante*, Vol. X. p. 291, where the first sect. of the Act is set forth.

Taylor, who was then living apart from his wife under the circumstances after mentioned, had left this country with his children, and gone to reside in France, but had occasionally visited England since; the children, however, had continued in France; and at the hearing of the petition, both they and Mr. Taylor were in that country.

The petition was presented on the 29th of October, 1839, and prayed that such of the children of the marriage as were under the age of seven years, might be delivered to and remain in the custody of the petitioner until attaining that age, and that the petitioner might be at liberty to have access to such of the children as the Court might not order her to have the custody of, under such regulations as the Court might deem convenient and just.

Affidavits were filed in support of the petition, stating the circumstances under which the separation between Mr. and Mrs. Taylor took place and had continued, and suggesting, among other things, that Mr. Taylor kept *out of the [*180] way to avoid personal service of the petition.

In December, 1839, the Vice-Chancellor, on an application made for the petitioner, ordered that service of the petition on Messrs. Freshfield, who had been employed, by Mr. Taylor, as his solicitors, in various transactions relating to the matters mentioned in the petition, should be good service on Mr. Taylor. His Honor, at the same time, said he thought that, in a gross case, he might make an order under the Act, *ex parte*, on the ground of necessity.

The petition having been served as directed, Mr. Taylor filed affidavits in opposition to those of his wife; and, she having replied to them, Mr. Taylor filed affidavits in rejoinder.

The affidavits on both sides were voluminous and contradictory, involving a variety of personal charges not necessary to be stated. The only facts of importance were the following:—That Mrs. Taylor, (against whose character there was no imputation,) on the 20th of October, 1837, left her husband's house without cause, and took up her residence with another family; alleging, in justification of that step, a charge of adultery which she then

preferred against her husband, upon grounds of which she afterwards admitted the entire insufficiency, and which was, in fact, wholly without foundation.

Overtures for a reconciliation were immediately made by Mr. Taylor, and various negotiations followed; but Mrs. Taylor, by the advice of her friends, at that time refused to return home.

Circumstances occurred which convinced Mr. Taylor
[*181] that his wife's affections were *alienated from him, and that no *bona fide* reconciliation could be expected; and which compelled him to break off communication with her advisers. Mrs. Taylor afterwards, in 1838 and 1839, made various overtures on her part, and wrote several letters of submission and qualified retractation of the charge of adultery, which failed to give satisfaction to her husband: and, after the petition had been presented, in consequence of a suggestion made by the Vice-Chancellor, on its being first mentioned in Court, she wrote a letter, dated the 8th of November, 1839, which amounted to an unqualified retractation of the charge.

Before that time, on the 27th of July, 1838, Mrs. Taylor had instituted a suit in the Consistory Court of London for restitution of conjugal rights. To this suit Mr. Taylor put in an allegation in bar, stating the circumstances under which his wife had left his house, and the charge she had made against him, and adding, "that although she well knew the charge to be entirely devoid of foundation, she persisted in refusing to retract it." This allegation was heard on the 5th of February, 1839, and was rejected by the Court. Mr. Taylor appealed to the Arches Court, where the judgment of the Consistory Court was affirmed on the 20th of June 1839. Mr. Taylor then appealed to the Judicial Committee of the Privy Counsel: and that appeal was pending when the petition came on to be heard.

In the second set of affidavits filed in support of the petition, there was a variety of personal charges against Mr. Taylor, which were completely answered by his affidavits in reply.

Mr. *Knight Bruce* and Mr. *Simpson*, for the petitioner, argued that this was nothing more than an application to the

*Court, to put the petitioner in possession of her legal [*182] rights. That the Act of Parliament created a positive right of access in the mother, which the Court could not take away without repealing the Act. That the Court was only the instrument appointed, by the Legislature, to put her into possession of that right. That it was a right of which nothing but her own criminality could deprive her; the case of adultery, and that alone, being specially excepted. It was the right of every innocent mother living in a state of separation from her husband. A discretion, indeed, was given to the Court; but that discretion was to determine the manner in which the right was to be enjoyed, not to take it away; to carry out, not to defeat the general intention of the Legislature: and the Court could not refuse access altogether, except in cases where the misconduct of the mother made it contrary to the interest of the children that she should see them, without defeating the intention of the Legislature. The interest of the children was the only consideration which could be allowed to interfere with the mother's right. In the case of Shaw(*a*) (the only previous application under this Act) the application was refused on that ground; as it appeared that the grandmother, by whom the children were supported, would have ceased to maintain them if the mother had been allowed access.

In this case, not only was the conduct of Mrs. Taylor free from all imputation of criminality, but she was, in fact, asking from the Court no more than what a competent tribunal had already pronounced her to be entitled to: for access to her children was a part of those conjugal rights which had been solemnly awarded her *by two decisions in the Ecclesiastical [*183] Courts. It might be said that those decisions were appealed from: but it was impossible, from the nature of the allegation, that the Privy Council should do otherwise than affirm them. Ought an appeal of such a nature to tie up the hands of justice? The Court was not precluded from acting in execution of its own orders pending an appeal; and there was no reason

(*a*) This case was privately heard.

why an appeal should prevent it from giving credit to the sentence of another jurisdiction.

In the present case, it might be urged that, as Mr. Taylor and the children were abroad, an order, if made, could not be executed. But it was unnecessary to consider that question now: the first question being, whether Mrs. Taylor had a right to the order or not; and, till that was settled, the Court had nothing to do with any question as to how the order was to be executed. Mrs. Taylor had a right to the order; the Act of Parliament gave it her; and the Court would execute that order, when made, as well as circumstances would allow. Even if it could not be executed at present, it would take effect as soon as Mr. Taylor or the children came within the jurisdiction; and, in the meantime, it would operate as a declaration of the petitioner's right and of her entire innocence.

Sir *William Follet*, Mr. *Jacob*, Mr. *Wigram*, and Mr. *Roundell Palmer*, for Mr. Taylor:—The question in the Ecclesiastical Courts is undecided: it is as much a *lis pendens* as if no judgment had been given. This Court will not anticipate the judgment of the Privy Council: it cannot be informed of the principles on which that tribunal will decide. Even if the Privy [*184] Council were to affirm the sentence of the inferior *Court, this Court would remain uninformed of the effect of such an affirmance. It does not follow, from any thing before this Court, that the rejection of an allegation is equivalent to a sentence for restitution of conjugal rights. If it were so, the sentence, after rejecting the allegation, would proceed, in terms, to decree restitution; which it does not. It is certain that, according to the practice of the Ecclesiastical Courts, a defendant may, at any stage of the proceedings before final judgment, put in a new allegation of *res noviter ad notitiam perventæ*; and Mr. Taylor may do so in this case, and may succeed on such a new allegation for anything which this Court can know to the contrary.

At the present moment, therefore, it stands undecided by the proper *forum*, whether Mrs. Taylor is, in point of law, entitled to conjugal rights. But, if it were decided that she is so entitled,

this Court would not be bound by the decision of the Ecclesiastical Courts. If those Courts decree restitution of conjugal rights to Mrs. Taylor, they can and will execute their own decree. That is no matter for the consideration of this Court; it must be left to them. The present jurisdiction is not given to the Lord Chancellor to be exercised in aid of the Ecclesiastical Courts, but to be exercised "if he shall see fit," that is, according to his own discretion. He is in no way bound by the principles or by the facts on which the judgments of the Ecclesiastical Courts proceed. A wife may be legally entitled to conjugal rights according to the doctrine of those Courts, and yet not morally entitled, according to the discretion of this Court. It would seem that, in the Ecclesiastical Courts, habitual slander of the husband by the wife, would furnish no defence against a suit for restitution; but it might be a perfect moral justification to the husband for *determining to live apart, and would be so [*185] recognized here. And, if this Court is informed of a mass of facts which have influenced the conduct of the parties, it will exercise a discretion formed upon the whole of those facts, and not upon such of them only as may have been disclosed to the Ecclesiastical Judge.

It is said that the Act of Parliament gives a legal right to the mother: but that conclusion cannot be arrived at upon any sound principles of construction. It is necessary to look at the previous state of the law and the terms of the act, in order to ascertain its true construction. By the common law, the absolute dominion over children during infancy, was in the father; and any right in the mother was totally unknown. She was supposed to be living with her husband; and, whether she did so or not, the legal right was in him. This was carried so far, that the Courts not only did not recognize a mother's claim to custody or access, but, even when the father was living in adultery and the mother entirely innocent, they interfered to compel the delivery of the children by the mother to the father. *Rex* v. *Greenhill*.(a) The Court of Chancery was accustomed to inter-

(a) 4 Adol. & Ell. 624.

fere in the case of wards of Court, with a view, not to the relief of the mother, but only to the benefit of the children. It never interfered against the right of the father, unless upon distinct proof, not only that the father was a person of immoral or irreligious conduct or principles, but that his children were in a position to be injured and corrupted by him. In *Ball* v. *Ball*,(*b*) the father was living in adultery; yet, as it did not appear that his children were brought into contact with the adulteress, the Court refused to interfere.

[*186] *Such was the state of the law when the Act, under which this petition was presented, was passed; and it was on account of those very cases, and especially of the case of *Rex* v. *Greenhill*, that it was adjudged "expedient to amend the law relating to the custody of infants." The jurisdiction already existing in the Court of Chancery, was found insufficient to reach the whole of those extreme cases in which an interference with the right of the father, was necessary for the benefit of the children; the Legislature considering that infants on whom no property was settled, and who could not, therefore, be made wards of Court, were nevertheless fit objects for its care and protection. The Act leaves the legal right of the father exactly where it found it: there is not a syllable to abridge it or take it away. It establishes no new jurisdiction, but simply enlarges a jurisdiction already existing; and leaves the character of the enlarged jurisdiction as it found it, that is, merely discretionary. It empowers the Court, under certain restrictions, to make the same order with respect to children not being wards of Court, as it could previously have made in the case of children who were wards; and that according to the discretion of the Judge to whom the application is made. But that discretion is a judicial discretion, and must be exercised on some principles. The Act no more suggests the desire of the mother as a new principle on which the discretion of the Court is to proceed, than it creates a new jurisdiction. The jurisdiction existed before, within narrower limits: but the principles on which it was exercised, were equally appli-

(*a*) Ante, Vol II. p. 35.

cable to other cases; and, now that the jurisdiction is enlarged, there can be no change of the principles. The effect of the enlargement is only to let in other cases to be governed by the same rule. The principles, therefore, which have determined the *discretion of the Court in cases where the [*187] custody of its wards was concerned, are the principles by which the Court will be regulated in exercising the enlarged jurisdiction given to it by this Act; and all the cases from which those principles are to be collected are applicable to the present application. In all those cases, the Court has grounded its interference on the interest of the infants only, and has refused to act against the legal rights of the father, unless a very clear case has been made out of danger to the moral or religious principles of the children. In *Shaw's case*, which is the only one that has arisen since the passing of this Act, the decision was in perfect accordance with that principle. The pecuniary interest of the children there prevailed against the petition of the mother.

There is no ground for contending that the mother has, by this Act, acquired a right, which would not go to the extent of proving that such a right will exist in all cases, except the single case of adultery, which is expressly excepted. The Court would be bound, upon such a construction, to order access in all cases; however causeless or wilful, on the part of the mother, the separation may have been; however culpaple her conduct; and however free from blame the conduct of her husband may be. If this jurisdiction is not exercised with the utmost caution, the greatest encouragement will be given to separations between husband and wife, when it is known that such a step on the part of the wife, will not cause the loss of her children's society. The greatest inducement to the reconcilintion of married people already separated, will be removed, by enabling the mother to gratify the affections of a parent, without returning to the duties of a wife. The regulation of access will be found a matter infinitely difficult; and the *nature of the inter- [*188] course between the children and their parents, will have the worst possible effect upon the minds of the children. They will grow up without filial respect for either parent. If such a

construction is to be put upon the Act, it may safely be pronounced one of the most mischievous which ever passed the Legislature.

It has been said that the Court will make this order without considering whether it can be immediately executed. [THE VICE-CHANCELLOR:—Mr. *Knight Bruce* said that the Court had nothing to do with the question whether the order could be executed or not. I thought, at the time, that that was a strong proposition.]—It is impossible that that question can be immaterial to the Court; for the order must be for access at given times and under given regulations. The order is special, not general; and, as circumstances vary, the parties must come again to the Court, and obtain a renewal of the order from time to time. The order, if made now, is to take effect at the present time and under the present circumstances; not at a future time or under future circumstances: therefore, if the present circumstances are such that it cannot take effect at the present time, it cannot be made at all. Future circumstances may be such that the Court, in the exercise of its discretion, might refuse access altogether, though it might be disposed to grant it now. It was said that the order, though ineffectual at present, would operate as a declaration of right on behalf of the petioner, and that she is entitled to such a declaration. But that is altogether foreign to this jurisdiction, and to the intention of the Act by which it is created. The Act does not direct or enable the Court to adjudicate upon disputed questions between the father and the mother, or to give any merely declaratory judgment: the order is to determine, [*189] not who *ought to have, but who shall have the custody of the infants; and, with regard to access to them, not merely that the mother is entitled to it, but in what manner she shall enjoy it. If the order stops short of that, it is not authorized by the Act. Would the Court make an order for the access of a mother resident in England, to children resident with their father in the East Indies? The order, if disobeyed, is to be enforced by process of contempt. That suppose the persons on whom the order is made, to be in position to commit a contempt. What contempt can the father be guilty of in this case, he having gone to reside out of the jurisdiction before the petition

was presented, and not, in fact, having ever been within the jurisdiction with his children, since the Act was passed: or what process of contempt would be applicable to his situation?

The Act was never meant to apply, and, evidently, does not extend to the case of children resident out of the jurisdiction, where such residence has commenced before proceedings under the Act were taken. Mr. Taylor, having appeared, may be said to have submitted to the jurisdiction: but his submission cannot alter the construction of the Act, or give jurisdiction where the Act, according to its true construction, does not give it. There must be express words in an Act of Parliament to make it extend to matters domestic and personal relating to British subjects while out of the jurisdiction of the British Courts. There is a distinction between domicile and residence. A man may be a domiciled British subject, yet be resident in a foreign country, and have no residence in Great Britain. If he dies, his property is distributed according to the law of the domicile; yet, while he lives, he is, in his person, and as to his personal rights and liabilities, subject to, and *entitled [*190] to the protection of the law of the country of his residence. If the children of British parents are resident in France, they must be subject to, and they will have the benefit of the law of France in all personal matters; and custody and access are matters of that kind. The children are subject, in their country of residence, to such parental rights as the law of that country has established in each parent respectively; the *status* of the parents, as husband and wife, being established by reference to the law of the country in which it was constitued. The parents, therefore, must have recourse to the law of the country in which their children are domesticated (though not domiciled) to ascertain and enforce their respective rights. If Mr. Taylor were a French subject resident with his children in England, under circumstances like those now before the Court, his children would be subject to the operation of this Act, and not to the law of France. Mrs. Taylor, though a domiciled French subject, would come before this Court, and, if she succeeded in satisfying the Court that the case was proper for the exercise of

its jurisdiction, an order under this Act would be undoubtedly made. By the same rule, the English law would cease to be applicable, when the children of an English subject were resident in France; and the remedy of the mother would be before the French tribunals. Is the same person to be subject, at the same time, to two different laws, possibly contradictory to, and conflicting with each other? This Court is not informed what is the law applicable to this subject in France. For anything that appears to the contrary, Mrs. Taylor may be absolutely entitled, by the law of France, to unlimited access to all her children, and to the absolute custody of such as are under a certain age. If so, why does she come here? or if, on the other hand, she *is absolutely excluded by that law, [*191] will this Court take upon itself to alter or overrule the law of France, to which these children are now subject? The children, and not the parents, are the subjects of this jurisdiction.

If, therefore, the wording of the Act had been general, it could not have been construed to extend to cases of infants, resident under the protection of a foreign law. But the wording of this Act is special, indicating, by direct and necessary implication, the limits within which its operation ought to be confined. The Act operates only through the judicial discretion which it gives. That discretion is vested in certain officers of the law, of limited local jurisdiction. There is nothing in the nature of that discretion to enlarge, with respect to its subject matter, the local jurisdiction of those officers: on the contrary, it is recognized as a limited jurisdiction, and the limits are pointed out by the Act itself. "It shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant, if he shall see fit, to make order, &c." The words, "in England," and "in Ireland, respectively," must of necessity mean, where the subject matter to be dealt with is in England or in Ireland respectively; and the children whose custody or access is in question constitute that subject matter.

It is clear that two distinct jurisdictions, *quoad locum*, are in-

tended to be given to the respective Courts of Chancery of England and Ireland: they are not to interfere with one another: each is to act where the subject matter belongs to its proper jurisdiction. Where the Irish Court of Chancery has jurisdiction, the English *Court of Chancery has none; [*192] and *vice versa*. The words "in Ireland," cannot have reference to the presentation of the petition: if so, a petition might be presented in the same matter in Ireland and in England at the same time; and the two Chancellors might make conflicting orders, and each proceed to enforce his own order by process of contempt. It is clear then that separate jurisdictions are intended; and if so, it is equally clear that each jurisdiction will take place according as the subject matter on which it is to be exercised is or is not situate within its limits. If the children of an Irish-born subject are resident in England, this Court will have jurisdiction, and the Irish Chancery will be excluded. On the other hand, if the children of an English-born subject are in Ireland, the petition must be presented to the Irish Chancellor. But, if the children are resident in Scotland, whether of English, Irish or Scottish birth and domicile, the jurisdiction of either Chancellor will be altogether excluded; otherwise they would have a concurrent jurisdiction, for there is nothing in the Act on which one of these jurisdictions could be established, in such a case, rather than the other; nor is there anything to give jurisdiction in the case of English or Irish-born subjects resident in Scotland which would not equally apply to resident natives of Scotland themselves. But, in fact, neither the English nor the Irish Court has jurisdiction to pronounce an order in any such case: their powers under this Act are commensurate with the limits of their official authority, which does not, in either case, extend to persons subject to the law of Scotland; and the Act itself, operating solely through their administration, is of no force beyond those limits. If the Legislature had intended to extend this act to Scotland, it would have vested in some Scottish functionary the *same discretion- [*193] ary power which is given to the English and Irish Chancellors. As it is, the law of Scotland relating to the custody

of infants, and the rights of their respective parents over them, remains unaltered by this Act; and no jurisdiction over infants subject to that law, either as to custody or as to access, is given to any English or Irish tribunal. If it were not so, power would be given, to an English or an Irish tribunal, to alter or supersede, in Scotland, the Scottish law relating to the custody of infants. But it is not so: the English Judge is to act in England, that is, he is to make such an order as will take effect in England; and the Irish Judge is to make such an order as will take effect in Ireland. Where the subject matter is in Scotland, no order can be made under this act. The machinery of the Act is not applicable to Scotland, nor to any of the colonies or dependencies of the British Crown. Much less can it be applicable, when the subject matter is situate in a foreign country, governed by independent laws, and not subject to the British Crown. This is the only construction consistent with those further provisions of the Act, which direct that the order shall regulate the times and manner of access, and shall be enforced by process of contempt. They suppose an order capable of taking effect, and incapable of being frustrated except by the disobedience of persons within the jurisdiction.

Mr. *Knight Bruce*, in reply:—The construction of this Act, which denies that any new right is given to the mother, and contends that it merely enlarges the old jurisdiction of this Court, leaving it to be exercised on the same principles as before, is ingenious, but purely arbitrary. It is utterly inconsistent with the known intention with which this Act was intro-
[*194] duced, *and, if adopted by the Court, would have the effect of repealing the Act. The intention was, manifestly, to create a right in the mother to which the Court should give effect in all cases of separation between husband and wife, where the wife had not been guilty of criminal conduct. Why was the mother to be the only person competent to petition for this order: and why did not the Act enable the Court to make the order for custody to be delivered to other parties, if it should think fit, as well as the mother? Evidently because it was the

interest of the mother which the legislature had solely, or primarily, in view. How can it be said that this Act was made to extend the former jurisdiction of the Court to the cases of infants who were not wards of Court, when it does not, in fact, so extend the jurisdiction? The Court cannot, under this Act, make an order for depriving the father of the custody of any child above the age of seven years, or of any child under that age, except upon the petition of the mother; however strong a case may be made to show that the father is unfit to have the custody of his children. Is it possible that the powers of the Court could have been so restrained, if the Legislature had intended to create a jurisdiction to be exercised merely for the benefit of infants who were not wards of Court, in the same manner as the previous jurisdiction was exercised in favor of those who were? There is no distinction taken by this Act between such infants as are, and such as are not wards; it applies equally to both. According to the construction contended for on the other side, the Act has no application to the cases of wards; but that construction almost contradicts the preamable of the Act, by denying that it has made any alteration in the law relating to the custody of infants. The clause which provides against the exercise of this jurisdiction *in favor of an [*195] adulterous mother, is out of place if this Act is not to be understood as conferring, upon the mother, a *prima facie* right: the Court, acting upon the principles of its former jurisdiction, never could have interfered in the manner provided against by that clause. That clause, by pointing out the criminality of the mother as the only cause which shall absolutely exclude her from the benefit of the Act, distinctly recognizes her general right in cases where no criminality can be imputed. In *Shaw's case*, besides the pecuniary interest of the children, there were other circumstances affecting the conduct of the mother.

It is stated that great mischiefs will result from this construction, and that it will operate to increase the inducements to separation between husband and wife, by making the wife too independent of her husband. That might have been a very good argument in Lord Apsley's time, when precisely the same rea-

sons were urged against giving effect to settlements of property to the separate use of married women. A different doctrine, as to that point, prevails now, and no inconvenience is found to be the result. But what justice or reason is there in the proposition that, when a separation has actually taken place, no protection is to be given to an unoffending woman; but she is to be left, in the tenderest point, at the mercy of a husband, who may have been originally to blame, and who may obstinately reject all overtures towards a reconciliation? Even if it might be contrary to public policy to interfere where the wife was blamable for the origin and continuance of the separation, how does that reason apply when the cause of the continuance, at all events, lies entirely with the husband?

[*196] *But it is said that these children are abroad, and not subject to the jurisdiction of the Court. It is immaterial whether they are or not. The person on whom the order is to be made, who is to deliver up the custody, or to permit access, is the proper subject of the jurisdiction. No order can possibly be made on the children themselves; it must be on the father, or the person in whose custody they are. In this case, Mr. Taylor is that person; and the Court has already decided in favor of its jurisdiction over Mr. Taylor, notwithstanding his foreign residence, by making the order for substitution of service of the petition upon his solicitors. That order might have been appealed from, or a petition might have been presented to have it discharged, which was not done. It was submitted to; and, having been submitted to, it is a positive decision upon the point of jurisdiction now attempted to be raised. Not only were no proceedings taken to set aside that order, but Mr. Taylor has appeared, has filed affidavits, and is now, by his counsel, before the Court. Can he be heard, after this, to say that the Court has no jurisdiction to make an order upon him on this petition, because he is resident abroad? If that were admissible, you might as well suffer a defendant, who has appeared and answered to any common bill, to set up the objection, after a decree has been made, that he cannot be bound by it, because he has been, all along, out of the jurisdiction. If the Court should hold that the

mere circumstance of a residence abroad, is sufficient to exclude its jurisdiction over domiciled British subjects, nothing more need be done by a father who is desirous of evading the operation of this act, than to take his children abroad after a petition has been presented, or at any stage of the proceedings before the order has been actually made. As to the argument *that the law of the foreign country in which the children and the father reside, is the law by which questions relating to the custody of the children are to be determined, that is not so: the law of the domicile will govern all such questions even in a foreign country; and the order of this Court, in the present case, would be enforced by the French tribunals. That is a question which it may be necessary for the Court to consider with reference to the mode of executing its order; and, with that view, it may be proper that the order should direct a reference to the Master, to inquire what is the state of the French law. But the question whether the Court has jurisdiction or not, depends upon other considerations. [*197]

With reference to the mode of enforcing the order, the Court will not presume that Mr. Taylor, who has appeared and submitted to its jurisdiction, will refuse to obey the order when made. If he does, he will be in contempt; and this act directs the order to be enforced by process of contempt of the High Court of Chancery. There is a process of contempt against the property as well as against the person. The practice of sequestration has been much more common of late than formerly, and Mr. Taylor's property is within the power of the Court, though his person is not.

THE VICE-CHANCELLOR:—This is one of the most painful cases that has ever come under my consideration.

It does not appear to me to be necessary, for disposing of the point, to enter into a consideration of a great number of the charges which have been brought forward on the one side and on the other, and with respect to which it is almost impossible to ascertain the *truth on the affidavits now before me. But, for the purposes of this case, as far as [*198]

the jurisdiction is to be exercised, I must look at the facts of the case, about which there is no dispute.

It appears that, on the 20th of October, 1837, Mrs. Taylor (under what I shall always consider the most unfortunate advice which a woman could receive) thought proper to absent herself from her husband's house; and, whether there was more or less disclosure made to her of the real circumstances of the case, does not appear to me to be very material, because she commenced the separation. In consequence of that separation, the husband, naturally feeling extremely hurt by the step which his wife had taken, took measures for leaving the country; and, in the course of the year 1838, he left England, and has substantially lived abroad ever since that time. On the 27th of July, 1838, Mrs. Taylor commenced her suit, in the Ecclesiastical Court, for a restitution of conjugal rights. The husband put in what is called a defensive allegation; and that allegation was rejected by the sentence of the Consistory Court on the 6th of February, 1839. And then, there being an appeal from that decision, it was affirmed, by the Arches Court, on the 20th of June, 1839; and the husband appealed from that decision as well as from the former one. Then, in the course of the summer of last year, a certain letter of retraction was written by Mrs. Taylor; and, on the 29th of October last, the present petition was presented to this Court.

Now I am not informed, at present, what would have been the effect of the sentence of affirmation had it never been appealed from: but, inasmuch as there is an appeal, one thing is quite certain, namely, that the suit is by no means determined. And I think it would be highly improper for me to give any [*199] opinion on the *question whether the affirmation, by the Court of Arches, of the sentence of the Consistory Court, was right or wrong; because, in the first place, this Court, or, at least, the jurisdiction given to the Lord Chancellor by this act, has nothing of an appellate jurisdiction over the proceedings of the Ecclesiastical Court: and, as a further reason, it occurs to me that it may be possible that I myself may have to sit as one of the appellate Judges in the privy counsel,

judging of that appeal; and, therefore, I shall refrain from pronouncing any opinion at all upon the matter. But certain it is that, at present, the wife having commenced the suit for restitution of conjugal rights, the final issue of that suit is uncertain; and it is in that state of the proceedings in the Ecclesiastical Court, that this lady has presented the petition which is now under consideration, and which, it should be observed, asks for a portion of that relief of which she will certainly have the whole, if her husband's appeal to the Privy Council is dismissed. She will have access to her children if a restitution of conjugal rights be finally decreed; for that decree, of itself, infers access to her children. [Mr. *K. Bruce*:—The husband might keep them apart.]—I am proceeding on the supposition that the decree of the inferior Courts would be enforced. At any rate, it would be then established, by the law of the land, that she had an unqualified right of access to her children.

Now it strikes me that the jurisdiction which this act has given, being to be exercised solely in the discretion of this Court, it would be hardly right for the Court to say that the lady was entitled to have access to her children, pending the question in the Ecclesiastical Court which she has thought proper to raise.

The conduct of the husband, as far as I am enabled to judge of it, has been *bona fide* throughout. He went [*200] to France, and began his foreign residence prior to the institution of the suit in the Ecclesiastical Court: and my opinion is, that if this Court were to direct access at such times, and subject to such regulations as it should deem convenient and just, it ought to be reasonably assured, before it did interfere at all, that it can carry its order into execution. If the children were here, the Court might then easily execute its order; but I doubt very much whether this act was meant to be applicable to a case where the husband, *bona fide*, before the presentation of any petition by the wife, had actually removed his children to a foreign country. It seems to me rather to be inferred, from the Act, that, as far as the husband and the children are concerned, their residence was to remain the same; and that the Act never meant that that should be altered; and I confess that I do not

at present see, (supposing that Mr. Taylor perseveres in presiding abroad, which, as the law at present stands, he may lawfully do,) how I could make any order which could be carried into effect. And the circumstance that no jurisdiction ought to be exercised under this act, pending the question in the Ecclesiastical Court, combined with the difficulty of making any order which could be enforced, appears to be a reason for not interfering under the act. There are no particular directions given by the act, except that it should be lawful for the Lord Chancellor, on hearing the petition of the mother, if he should see fit, to make an order for the access of the petitioner to the infant or infants, at such times, and subject to such regulations as he shall deem convenient and just. And, independently of that, the very fact that this lady did, without cause, remove herself from her husband, [*201] appears to me to be a reason why *this Court ought not to exercise the jurisdiction of ordering any access.

I am of opinion, therefore, that no order should be made upon the petition at present: and what I am inclined to do is this, simply to make no order on the petition, but to give leave to the parties to apply: because *non constat* that there may be such a termination of the proceedings in the Ecclesiastical Court as may make it right, coupled with other circumstances which may happen, for this Court to interfere on the ground of the facts stated in this petition.

But, before I finally dispose of this case, I cannot help saying that there is nothing whatever to sully the character of Mrs. Taylor in the slightest degree. The persons who are most culpable are those who have so injudiciously advised her to continue living apart from her husband.

With respect to Mr. Taylor, although he appears to have been hasty in some things, yet he seems to have acted with very great kindness and generosity, not only to his wife, but to his friends, dependents, and to a variety of other persons with whom he was accidentally connected. And I sincerely hope that he will allow his generous disposition to have its full scope; and, although he has suffered deeply and received injuries, that he will forgive

what has passed, and no longer keep his wife from her children and her home.

Under all the circumstances of this case, I will not make any order on this petition, until I know what will be the result of the proceedings in the Ecclesiastical Court. The petition therefore will stand over, with liberty to apply.

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*Griffiths *v.* Pruen. [*202]

1840: 7th August.

Testator, after reciting that his property consisted of a house at C., (which was freehold,) and of mortgages, &c, directed the house to be sold; and then gave several pecuniary legacies, and amongst them, 300*l.* to G., and 100*l.* to P., whom he appointed his executors. The will concluded thus: "and to Mr. G., who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled." G. died the day after the testator, without having proved the will. Held, in a suit by his executors against the testator's heir and next of kin, that the plaintiffs were entitled to the residue of the testator's estate, including the proceeds of the house.

If an executor is also the residuary legatee, he is entitled to the residue, although he does not prove the will.

The testator in the cause, by his will, after reciting that his property consisted of a dwelling-house in Cheltenham, sundry mortgages and moneys in the English funds, directed the house (which was freehold) to be sold: he then gave pecuniary legacies to his brothers and several other persons, and concluded his will in the following words:

"I give and bequeath to Mr. Thomas Griffiths, solicitor, of Cheltenham, the sum of 300*l.*; and to Mr. Pruen, his partner, 100*l.*; and I constitute and appoint those two gentlemen my executors and trustees. I request to be buried in the family vault at Trowbridge, where my father and mother rest. After providing for all the various legacies specified in the foregoing, and paying my debts, and funeral and other expenses, I direct the sum of 50*l.* to be given to E. M., and 50*l.* to Mrs. C.: and, to my friend

Mr. Thomas Griffiths, who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled agreeably to this my determination."

Both Griffiths and Pruen survived the testator; but Griffiths died on the day after the testator's death, and, conse-
[*203] quently, *without having proved the will. His executors, however, claimed the residue of the testator's estate, including the legacy of 300*l.* and the proceeds of the sale of the house.

It was objected, for the defendants, that Griffiths ought to have proved the will, in order to entitle himself to the benefits under it. And the testator's heir-at-law claimed the proceeds of the sale of the house, on the ground that they were not expressly disposed of, and that the direction to sell the house was not, of itself, sufficient to deprive him of his right as heir.

Mr. *Jacob* and Mr. *Blower*, for Griffiths's executors, relied on *Parsons* v. *Saffery*.(*a*)

Mr. *Knight Bruce* and Mr. *Stinton*, for the testator's next of kin, cited *Reed v. Devaynes*,(*b*) and said that it was clearly settled that an executor must prove the will in order to entitle himself to a legacy, and that there was no case which showed that there was any difference, in that respect, between a legacy and a residue.

Mr. *Bethell* and Mr. *Hallett*, for the testator's heir, cited *Kellett* v. *Kellett*,(*c*) *Maugham* v. *Mason*,(*d*) *Wilson* v. *Major*,(*e*) *Dunnage* v. *White*,(*f*) *Dixon* v. *Dawson*.(*g*)

THE VICE-CHANCELLOR:—I have always understood the rule to be that, where either a general or specific legacy is
[*204] given to an executor, *he must prove the will, in order

(*a*) 9 Price, 578.
(*b*) 2 Cox, 285.
(*c*) 1 Ball & Beatt. 533; and 3 Dow. P. C. 248.
(*d*) 1 V. & B. 410.
(*e*) 11 Ves. 205.
(*f*) 1 Jac. & Walk. 583.
(*g*) 2 Sim. & Stu. 327.

to entitle himself to it: but that does not apply to the case of a residue.

With respect to the second point, it is manifest, on the face of the will, that the testator meant to dispose of the whole of his property. He begins by saying that his property consists of a dwelling-house in Cheltenham, sundry mortgages and moneys in the English funds: and then he directs the house to be sold. That direction has the effect of converting the house into money. Then, after giving pecuniary legacies to Mr. Griffiths and several other persons, he says: "To my friend, Mr. Thomas Griffiths, who is likewise my executor, any sum then appearing, after the contents of this my will are fully complied with and fulfilled." It is expressed, therefore, that every thing, after satisfying the contents of his will, should go to Mr. Griffiths.

I am of opinion, therefore, that that gentleman's executors are entitled to the whole residue of the testator's estate, including the proceeds of the house directed to be sold.

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*Hastings *v.* Orde. [*205]

1840: 7th August.

On the marriage of a female ward of court, her fortune, consisting of choses in action, was settled, with the sanction of the court, in trust for her husband and herself for their lives, with remainder for their children, with remainder for her absolutely, if she survived her husband, but if not, then as she should appoint by will, with remainder for her next of kin. Some years afterwards, the marriage, of which there was no issue, was dissolved by Act of Parliament. After which the husband released all his right and interest under the settlement, to the wife. Held that the settlement was not binding on the wife, and that she was at liberty to re-settle her property on her second marriage.[1]

By an indenture dated the 31st of March, 1832, being the settlement made, with the approbation of the Court of Chancery, in

[1] Where the personal estate of a debtor was insufficient to discharge all his debts, the right of a simple contract creditor to have his demand satisfied out of

contemplation of the marriage between William Carleton and Harriet Orde, who was then an infant and a ward of the Court, certain sums of stock and other choses in action, some of which were the property of the intended husband, and the remainder the property of the intended wife, were assigned to trustees, in trust, during their joint lives, to pay the yearly sum of 100*l.* to the intended wife for her life, for pin-money, and, subject thereto, in trust for the intended husband for life, and, after his decease in trust for the intended wife for life, and, after the decease of the survivor of them, in trust for their children as therein mentioned; and, in case there should be no child of the marriage, in trust, as to the property of the intended husband, for him, his executors, &c., and, as to the property of the intended wife, in trust for her, her executors, &c., in case she should survive her intended husband, but in case she should die in his lifetime, then in trust for such person and persons, &c., as she should by her will, to be executed in manner therein mentioned, appoint, and, in default of such appointment, in trust for her next of kin, according to the statutes of distribution, as if she had died unmarried and intestate.

[*206] *On the 1st day of July, 1839, the marriage between Mr. and Mrs. Carleton, of which there was no issue, was dissolved by act of Parliament.

Pending the bill for dissolving the marriage, a deed of arrangement was entered into between Mr. and Mrs. Carleton and the trustees of the settlement, dated the 6th of June, 1839, by which Mr. and Mrs. Carleton agreed that, as soon as the marriage should be dissolved, the trustees should stand possessed of Mrs. Carleton's property then subject to the trusts of the settlement, in trust for her, her executors, &c., freed and discharged from all Mr. Carleton's right and interest therein, as if the marriage had never been solemnized; and Mr. Carleton directed the trustees to assign such property to Mrs. Carleton, her executors, &c.,

his real estate which had descended to his heiress at law, was held not to have been defeated by articles executed by her while still a minor, previously to and in contemplation of her marriage, *Pimm* v. *Insall*, 1 Hall & Twells, 487.

accordingly; and Mrs. Carleton agreed, with Mr. Carleton, that, within 60 days after the dissolution of the marriage, she would release his property then subject to the trusts of the settlement, from the 100*l.* a year pin-money, and also from her life interest and all other her right and interest therein, to the intent that such property might be absolutely freed and discharged from all her right and interest therein, in the same manner as if the marriage had never been solemnized. This arrangement was carried into effect by an indenture dated the 24th of July, 1839.

Shortly afterwards Mrs. Carleton married James Hastings; and, by the settlement on their marriage, part of the lady's property was settled in trust for her separate use, and the remainder in trust for her and Mr. Hastings and their children. There was issue of that marriage one child.

Ths bill was filed by Mrs. Hastings, against the trustees of both the settlements, Mr. Carleton, Mr. Hastings, and *the child of the second marriage, alleging that the [*207] trustees of the settlement of March, 1832, had refused to transfer Mrs. Hastings's property to the trustees of the settlement of July, 1839, on the ground that the trusts of the former settlement were still binding on Mrs. Hastings and the other parties thereto; but Mrs. Hastings charged that those trusts had been put an end to by the act of Parliament and the deeds of arrangement; in consequence of which she became as absolutely entitled to her property as if the first settlement had never been executed, and as if her first marriage had never been solemnized.

The bill prayed that the trustees of the first settlement might be decreed to transfer and assign Mrs. Hastings's property, to the trustees of the second settlement, upon the trusts thereof.

The cause now came on to be heard as a short cause.

Mr. *Jacob* and Mr. *Walpole*, for the plaintiff, cited *Simson* v. *Jones*,(*a*) and *Godsal* v. *Webb*.(*b*)

Mr. *Ellison*, for the trustees of the first settlement, contended that the trust, in that settlement, for the plaintiff's next of kin,

(*a*) 2 Russ. & Myl. 365. (*b*) 2 Keen, 99.

could not be defeated except by a testamentary appointment made by her, and, consequently, that trust was still subsisting. He said that the case of *Simson* v. *Jones* had been appealed from, but the appeal was, afterwards, abandoned, as it was found that the lady would be of age, and would have the power of confirming the settlement, before the appeal could be disposed of.(*a*)

[*208] *Mr. *Parker* and Mr. *Lefroy* appeared for the other defendants.

The VICE-CHANCELLOR:—The case is this. A female infant being entitled to choses in action, a settlement was made of them, on her marriage, in trust for her husband for life, and, after his decease, in trust for her for life, and, after the decease of the survivor, in trust for the children of the marriage, and, if there should be no child, then in trust for such persons as she should appoint by her wlll, with the ultimate trust for her next of kin; and, the marriage having been put an end to, and there being no issue, the question is whether the lady is still bound by the settlement.

I am of opinion that she is not bound by it.

[*209] *MADDEFORD *v.* AUSTWICK.

1840: 3d and 4th Nov.

A defendant in a suit for taking accounts, omitted to insert, in his examination, any receipts or payments by him during a certain period: The plaintiff, however, proved receipts by him during that period. The court refused to allow the defendant to bring in a further examination or additional accounts, or to give any evidence of payments in order to discharge himself from those receipts.

Pending an inquiry before the master, the court will not interfere with his conduct. The dissatisfied party must wait until the report is made, and then except to it.

THE plaintiff and the defendant having been co-partners as carriers, and the co-partnership having been dissolved in 1821, a

(*a*) See 2 Russ. & Myl. 377.

decree was made, by Sir J. Leach, V. C., in 1826, and was affirmed by Lord Brougham, C., in 1833,(*a*) for taking the accounts of the concern. The plaintiff having carried, into the Master's office, interrogatories for the examination of the defendant under the decree, the defendant put in his examination thereto. The examination having been held to be insufficient, the defendant put in a further examination, which was held to be sufficient. It appeared, from both those examinations, that, during two of the years that the partnership subsisted, namely, 1817 and 1818, the defendant had neither received nor paid anything on account of the concern. The plaintiff, however, afterwards succeded in charging him with the receipt of large sums of money, during those years. In consequence of which the defendant, in order to discharge himself from those receipts, offered evidence of payments made by him during the same time. But the Master held that, as the payments were not mentioned in the defendant's examinations or in the schedules thereto, the evidence tended to contradict the examinations, and therefore was inadmissible. That decision was made in June, 1838. In July following, the defendant gave a notice of motion, which was substantially the same as the one after-mentioned; but, shortly afterwards, and before the motion was heard, he died.

*The suit having been revived against his widow and [*210] personal representative, a motion was now made on her behalf, in pursuance of a notice dated the 28th of January, 1840, that she might be at liberty to carry, into the Master's office, such accounts as she might be advised, and that she might be at liberty to examine witnesses and tender evidence, on her behalf, on the taking the said additional accounts in the Master's office under the decree, notwithstanding the said additional accounts might not have been included in the examinations filed by the late defendant Austwick: or, otherwise, that she might be at liberty to file a further examination in answer to the interrogatories exhibited, before the Master, for the examination of the late defendant; and also that she might be at liberty to ex-

(*a*) See ante, Vol. I. p. 89; and 2 Myl. & Keen, 279.

amine witnesses and tender evidence, on her behalf, in opposition to the charge brought into the Master's office, against the late defendant; or that the Court would make such further or other order as the circumstances of the case might require.

Mr. *Jacob* and Mr. *Steere* supported the motion on the ground that it appeared, from the affidavits, that the omission to insert the payments made by Austwick, in 1817 and 1818, in the schedules to his examinations, arose from mistake. They added that, if the rule was that no item in a discharge could be allowed unless it was contained in the previous examination of the party, there could be no such thing as a discharge: that, if Mr. Austwick had stated, in his examination, that no such payments as those in question had been made, that might have been a sufficient reason for the Master's not allowing him to give evidence that the particular payments had been made; but it furnished no ground for refusing evidence in support of items in a discharge, that the examination wholly omitted to mention
[*211] *them; for they might have come to the examinant's knowledge after he had put in his examination.

Mr. *Knight Bruce* and Mr. *Roupell*, for the plaintiff, contended that the omission, on the part of Austwick, to insert his receipts during the year 1817 and 1818, in his examinations, was intentional and fraudulent: that the case made by the affidavits in support of the motion, was completely disproved by the affidavits in answer to them: that it was in evidence in the cause, and was noticed, by Sir John Leach, in his judgment at the hearing, that, during the continuance of the partnership, the plaintiff was wholly employed in the out-door business of the concern, and that Austwick was principally employed in the in-door business, and especially, in keeping the accounts, and superintending the clerks who were employed for that purpose:(*a*) that the statement deliberately made by Austwick, that he had received nothing during the years 1817 and 1818, had been completely fal-

(*a*) See ante, Vol. I. p. 90.

sified: that, notwithstanding a defendant was never allowed to give evidence to contradict his own answer, the object of the present motion was to allow an unlimited contradiction to what had been before stated upon oath; that the Court was extremely cautious in allowing a defendant to put in a supplemental answer: *Livesey* v. *Wilson*;(a) *Curling* v. *Marquis Townshend*;(b) *Greenwood* v. *Atkinson*;(c) that, in the second of those cases, Lord Eldon, C., said: "In every former instance, the party proposing to obtain this permission, has been required to give a precise statement of what he means to put upon the record; the Court, with great care and jealousy, before it will allow a defendant to withdraw a statement that is beneficial *to [*212] the plaintiff, requiring to be clearly satisfied that justice demands such a benefit to the defendant; and, to secure that effect, has required him specificially to state what he wishes to put upon the record, that the Court may judge how far his application is reasonable.*** It would be very difficult, even upon negligence, unless the party was led into it, to have the records of the Court altered: and I dare not, in such a case, let it be in fact what it may, lay down a principle that would form a precedent for permitting an answer, after the lapse of two years, to be altered, in effect, from one end to the other. This must, therefore, be considered as it stands upon the record, unaltered: and I should be sorry to be thought to have much doubt upon a point of so much importance:" that, in the present case, Mrs. Austwick had made no affidavit as to the *bona fides* of what she proposed to introduce, notwithstanding she was asking the Court to allow an unlimited contradiction of that which her husband had before stated on his oath: that it was directed, by the 69th of Lord Lyndhurst's Orders, that the Master should have power, at his discretion, to examine any witness *viva voce*; and, consequently, the examination of a witness was the act of the Master, not of the party; and the Master was bound to exercise a judicial discretion as to whether he would take that step or not; that, at all events, the application was premature and irregular;

(a) 1 Ves. & Beam. 149. (b) 19 Ves. 628, 631, 632. (c) Ante, Vol. IV. p. 54

as Mrs. Austwick ought to have waited until the Master had made his report, and then to have excepted to it; according to what was laid down in *Chennell* v. *Martin*,(*a*)

THE VICE-CHANCELLOR:—In this case there are two questions. The first is whether I ought now to interfere
[*213] with what is doing in *the Master's office. The second is whether I ought to make any order which will have the effect of relieving the estate of Austwick from the consequences which may ensue from the examinations which he has put in.

With regard to the first question, I apprehend it is not the course of this Court to interfere in a case where the parties dispute between themselves, whether the Master is right in a particular step. It frequently happens that, where the Master has any difficulty, he himself desires the parties to make an application to the Court; and then the Court makes an intimation for the Master's guidance. But it is inconsistent with the practice of this Court, that, because the Master has determined to do a particular act, the party objecting to it, should apply to this Court and ask the Court to overrule the Master. Whilst the reference is pending, the question, whether the master is right or wrong, is one which the Court cannot enter into. When the Master has made his report, then and not before, his course of proceeding on the reference, may be, legitimately, made the subject of exception.

The 69th New Order first gave, to the Masters of this Court, a discretionary power as to examining witnesses *viva voce:* and the conduct of the Master in the exercise of that discretion, may be made the subject of exception in the same manner as anything done by him prior to that order, might have been. But I cannot, on a motion, interfere and say that what the Master has done as to a particular witness, is right or wrong.

The next question is whether, supposing that the Court doesnot now interfere in the way suggested, it ought now

(*a*) Ante, Vol. IV. p. 340.

to make some order to enable the party to *introduce [*214] other evidence before the Master. It is represented that Mr. Austwick did unintentionally and by mistake make a representation, in his examinations, that was incorrect, and that, having regard to the facts now appearing, I ought to enable his representative to make a case in opposition to that which is the result of the examinations already put in. Now, does it sufficiently appear that there has been such mistake?

The joint affidavit of Mr. Austwick, and his solicitor, after representing certain preliminary matter, not now necessary to be observed upon, states that the interrogatories for the examination of Austwick were allowed by the Master in January, 1836, and that steps were so far taken for putting in his examination, that, before the end of the next month, his counsel had perpared the body of the examination, and written, on the draft, this very proper advice: "The material part of the examination is the schedules: please to see that they are correct." It was clear that the most important part of the examination was the schedules. It appears that it was represented, by Austwick, that, before putting in his examination, the books and accounts of the partnership, which Austwick had delivered up to the plaintiff, in obedience to an order in the cause made in 1825, ought to be produced; and a warrant having been taken out for the production of them, the Master, on the 8th of February, 1836, fixed a day for that purpose; but gave notice, to Austwick, to be preparing his examination. His counsel had performed his part, and had given advice which was most proper and judicious. Then a warrant was issued on the 6th of July, to compel Austwick to bring in his examination; and the Master fixed the 13th of July for him to *bring it in. [*215] [His Honor here read several passages from the affidavits, and then stated the conclusion which he drew from them, in the following words:] It appears to me that Mr. Austwick was struggling to gain time; and, when he found that he could not get further time, he was reckless of what he did. He put upon the files of this Court, a document the contents of which he knew to be incorrect. And, when he was ordered to put in

his further examination, he pertinaciously adhered to the same line of conduct, as he had pursued with respect to his first examination.

Under these circumstances, I do not think it is consistent with the duty of this Court, to go out of its way to relieve him, or, which is the same thing, to relieve his personal representative. It sufficiently appears, from the affidavits, that the fact is that, whether Austwick formed in his mind a scheme of fraud or not, he intended to state that which he knew not to be true.

This Court has granted relief in cases of mistake; but in that case of the solicitor which has been mentioned,(*a*) I refused to relieve; and that decision was affirmed by the Lord Chancellor.

Taking all the circumstances of this case into consideration, I cannot but think that it is one in which this Court ought not to give relief; and, therefore, I shall refuse the motion with costs.

[*216] *ROOKE *v.* WORRALL.

1840: 6th November.

Testator, by his will, after devising his real estates, and giving pecuniary legacies, directed his debts, funeral and testamentary expenses, and the legacies thereby given, to be paid as soon as conveniently might be after his death: "And I charge my debts and legacies on my real and personal estate." By a codicil, he gave to A. and B. a sum of stock, and directed the trustees and executors of his will (who were the same persons) to purchase and transfer the stock to A. and B., in trust for C. for life; and, subject thereto, in trust to permit the same to return to and become part of his personal estate. Held, that the charge in the will extended to the legacy given by the codicil.

GEORGE ROOKE, the testator in the cause, by his will dated the 14th of May, 1827, devised his real estates to three persons in succession, and to their sons and daughters, in strict settlement, and directed that, on their becoming entitled in possession to his estates, they should assume his name and arms: and he be-

(*a*) *Greenwood* v. *Atkinson*. See ante, Vol. IV. p. 64. The appeal appears not to be reported.

queathed certain articles of plate to the trustees of his will, in trust to hold the same as heir looms to his real estates, so far as the rules of law and equity would permit. He then gave some pecuniary legacies, and directed all his just debts, funeral and testamentary expenses, and the legacies thereby given, to be paid as soon as conveniently might be after his decease: "And I charge my debts and legacies on my real and personal estate." He then gave the residue of his personal estate, to the trustees upon trust to complete the contracts which he had entered into for the purchase of real estates, and to take conveyances thereof to the uses thereinbefore declared of his real estates, and, subject thereto, upon trusts corresponding with the uses thereinbefore declared of his real estates, except that, after the decease of the respective tenants for life, the same was to be divided equally, amongst the younger children of such tenant(*a*) for life, as tenants in common; and he appointed the trustees executors of his will.

The testator, by a codicil dated the 22d of January, 1833, and duly executed and attested to pass *freeholds [*217] of inheritance, after reciting that two of the tenants for life named in his will, had died without issue, gave all his real estates, after the death of the surviving tenant for life, to the plaintiff in fee: and, after payment of his debts, funeral and testamentary expenses and the legacies given by his will, he bequeathed all the residue of his personal estate, subject to the life interest therein of the same tenant for life, to the plaintiff, his executors, &c.: and he thereby confirmed his will.

The testator, by another codicil dated the 26th of April, 1839, and executed and attested in like manner as the preceding one, gave to R. L. Fisher and Henry Ward, the sum of 13,433*l.* 6*s.* 8*d.* three per cent. consols: and he directed the trustees or executors of his will to purchase and transfer the same into their names at the expiration of three calendar months after his decease: and he directed Fisher and Ward to pay the interest, dividends and annual produce of the said trust-moneys, stocks, funds and securities to the defendant, Frances Thorne, during so

(*a*) So in brief.

long as she should live and should not sell, mortgage or otherwise charge or dispose thereof by anticipation, or become bankrupt or insolvent; and, subject to the trusts thereinbefore declared, to permit the said trust-moneys, stocks, funds and securities to return to and become part of the residue of his personal estate.

Sir. W. H. Robinson, one of the trustees and executors of the will, died in the testator's lifetime. The testator died on the 15th of September, 1839; and, shortly afterwards, his will was proved by the defendant, George Worrall, the surviving executor and trustee.

One question was whether the legacy given in trust for Frances Thorne, was charged upon the real estates.

[*218] *Mr. *Knight Bruce*, and Mr. *Romilly*, for the plaintiff: The charge in the will is confined to legacies thereby given. In the codicil by which the legacy in question is bequeathed, there are no words charging it on the real estates; but there are words in it which show that the testator never contemplated that that legacy would be a charge on his real estates; for he directs that it shall return to the residue of his personal estate. A charge of legacies in a will, does not extend to legacies given by a codicil, unless words are used in referring to legacies thereinafter given. *Bonner* v. *Bonner*,(a) *Strong* v. *Ingram*.(b)

Mr. *Jacob* and Mr. *Freeling*, for defendants, who were in the same interest as the plaintiff.

Mr. *Stuart* and Mr. *James Parker*, for the defendant, Frances Thorne:—The charge in the will is a general charge of debts and legacies; and, therefore, it extends to legacies given by a subsequent instrument. *Hyde* v. *Hyde*,(c) *Masters* v. *Masters*.(d) A charge of debts, includes not only debts then due, but those af-

(a) 13 Ves. 379.
(b) Ante, Vol. VI. p. 197.
(c) 1 Eq. Ab. 409.
(d) 1 P. W. 421.

terwards incurred: and, on the same principle, where a testator unites debts and legacies in one charge, it includes legacies given by a subsequent instrument. Unless there are restrictive words in the will, which confine the charge to legacies thereinbefore given, it extends to legacies given by a subsequent instrument. In *Bonner* v. *Bonner*, the charge was not a general one; and that is the ground on which Lord Eldon rests his judgment in that case. There is no case in which a charge expressed in terms equivalent *to those used in this will, has not [*219] been held to be a general charge.

It must be observed, too, that the legacy is not a legacy of stock; but of money to be laid out in the purchase of stock: and it is not to be paid by the executors, but by the trustees and executors.

Mr. *G. Richards* and Mr. *James*, for the defendants Fisher and Ward, the trustees of the legacy.

Mr. *Knight Bruce*, in reply, said that the executors and trustees were the same persons; and that the testator had put his own interpretation on the charge, when he directed the legacy to return to his personal estate.

THE VICE-CHANCELLOR:—The first question is with respect to the charge in the will.

I think that the legacy is charged on the real estate; because the expression is this: "I direct all my just debts, funeral and testamentary expenses, and the legacies hereby given, to be paid as soon as conveniently may be after my decease." That is one distinct sentence, and it is applicable to the legacies thereby given. Then these words follow: "And I charge my debts and legacies on my real and personal estate." Now there is nothing, in those words, which necessarily makes them applicable only to the debts and legacies that were before spoken of. The legacies before spoken of were legacies of a particular description; legacies "hereby given:" and there is no repetition of those words in the second member of the sentence, nor any reference to what

had gone before, by any such words as "said" or "afore-
[*220] said." *Therefore, taking the words as they stand, it appears to me to be a charge of all debts and legacies on the real estates. And I do not think that the effect is cut down at all, by the particular expression found in the codicil itself, where the testator has directed that, subject to the trust, the trust money should return to and become part of his personal estate.

Then there is this observation to be made. The direction is that the trustees or executors shall purchase and transfer the stock. Now, though it is true that the same persons were named trustees as were named executors, yet it might easily have happened that one of them might have refused to prove the will. Nevertheless, he would have remained a trustee. And in my opinion, it is quite plain that the expression "trustees or executors," did apply to the money being raised out of the land as well as out of the personal estate.

*Jones *v.* Bruce. [*221]

1840: 6th November.

Testator gave, to his wife, all his goods, chattels, and personal estate whatsoever, and charged his real estates with the payment of his funeral and testamentary expenses and debts, and exempted his personal estate from the payment thereof. He then gave pecuniary legacies to two of his children, and charged his real estate with the payment of them; and directed that, during the minority of the legatees, his trustees, their heirs and assigns, should raise, out of the rents of his real estate, or by any other means they might deem expedient, annual sums for the maintenance of the legatees, not exceeding four per cent. per annum, upon their respective legacies. Some years afterwards, the testator was found a lunatic; and, by an order in the lunacy, 4,250*l.* was allowed, yearly, for the maintenance of him and his family; and such allowance was to be made from the 6th of April, 1834, and to be continued, from time to time, until further order, and to be paid, to his wife, by the committees of his estate, out of the rents and profits thereof. The testator died on the 6th of October, 1839. His wife had received all that was due in respect of the allowance down to the 6th of April, 1839, but nothing afterwards. She claimed, under his will, his personal estate, including the rents of his real estates due at his death, free from the payment of his funeral and testamentary expenses, debts and legacies; and she also claimed one moiety of the 4,250*l.* for the last six months of the testator's life, and insisted that it ought to be raised, as a debt, out of the real estates. Held that the funeral and testamentary expenses, debts and legacies were payable out of the real estates only, and that the widow was entitled to the whole of the personal estate, including the arrears of rent; but that she was not entitled to the moiety of the 4,250*l.*, that sum being payable only out of the rents, and there being, in consequence of her claim before mentioned, no rents to pay it with.

Sir Thomas John Tyrwhitt Jones, made his will, dated the 17th of February, 1826, and which was partly as follows: "I give and bequeath, unto my wife absolutely, all my goods, chattels and personal estate whatsoever, wheresoever, and of what nature or kind soever. I charge all my real estates, situate, lying and being in the counties of Denbigh and Salop, with the payment of all my funeral and testamentary expenses, and all such debts *as may be due and owing from me [*222] at the time of my decease: and I hereby exempt, so far as I am able, all my personal estate from the payment of the same or any part thereof. I give, devise and bequeath to my

natural son, Charles Tyrwhitt Jones, the sum of 20,000*l.*, and, to my natural daughter Eliza Jones, the sum of 5,000*l.*; and I hereby charge all my real estate with the payment of the said several sums. And my will is that the said sum of 20,000*l.* shall be paid, to my said son, upon his attaining his age of 25 years, and that the said sum of 5,000*l.* shall be paid to my said daughter, upon her attaining her age of 25 years or day of marriage, whichever shall first happen; and that, in the meantime, in case my wife shall die during the minority of the said two children, but not otherwise, the trustees of this my will, their heirs and assigns, shall levy and raise, from and out of the rents, issues and profits of my said estates, or by any other means they may deem expedient, such annual sums for the maintenance, education and support of my said son and daughter as shall not exceed four per cent. per annum, upon the respective provisions intended to be made for them, and do and shall pay and apply such sums accordingly." The testator then gave all his real estates, subject, nevertheless, as to such portions thereof as were situate in the counties of Denbigh and Salop, to the charges thereinbefore mentioned, and subject also to the charges to which they were then liable, to his wife, Eliza Walwyn Tyrwhitt Jones, for her life, with remainder to his son Henry Thomas for life, with remainder to his first and other sons in tail male, with remainder to his son Edmund for life, with remainder to his first and other sons in tail male, with remainder to his natural son Charles Jones for life, with remainder to his first and other sons in tail male, with remainder to his own right heirs.

[*223] *Some years after the date of the will, a commission issued under which the testator was found a lunatic; and, by an order in the lunacy, dated the 25th of April, 1835, it was ordered that 4,250*l.* per annum should be allowed for the maintenance of the lunatic and his family, and that 300*l.* per annum should be allowed to his wife, lady Jones, who was the plaintiff in the cause, for pin-money, and that such allowances should commence and be made from the 6th of April, 1834, and be continued, from time to time, until further order, and be paid

to lady Jones, by the committees of the lunatic's estate, out of the rents and profits thereof.

The testator died on the 6th of October, 1839; at which time the rents of his estates, which became due on the 29th of September preceding, were unpaid. Lady Jones, who was the committee of the testator's person, had received all the payments that became due in respect of the before-mentioned allowances, down to the 6th of April, 1839; but no payment had been since made to her on account thereof.

At the hearing of the cause for further directions, the questions were, first, whether the testator had, by his will, exonerated his personal estate from the payment of the legacies given to his natural son and daughter.

And, secondly, whether one moiety of the 4,250*l.* was, as lady Jones alleged, due to her at the testator's death, and ought to be raised and paid to her out of the testator's real estates, as one of the debts charged thereon by the will.

Mr. *Jacob* and Mr. *Loftus Wigram*, for the plaintiff, contended, first, that she was entitled, under the will, to the testator's *personal estate, free from the payment of his funeral and testamentary expenses, debts and legacies. They cited *Greene* v. *Greene*,(*a*) and *Michell* v. *Michell*.(*b*) [*224]

With respect to the second question, they said that lady Jones was clearly entitled to stand as a creditor on the testator's estates, in respect of the arrears of the yearly allowances directed to be made to her by the order in the lunacy: that that order directed those allowances to commence and be made from the 6th of April, 1834, and, therefore, one whole year ought to have been paid to her, by the committees of the lunatic's estate, on the 6th of April, 1839.—[THE VICE-CHANCELLOR: The order directs the allowances to be paid out of the rents of the lunatic's estate: therefore, it presumes a receipt of the rents, prior to the payment to lady Jones.]

Mr. *Dean* appeared for the executors of the testator.

(*a*) 4 Madd. 148. (*b*) 5 Madd. 69.

Mr. *Parry*, for the testator's legitimate sons: I submit that the testator's real estates are not charged with the legacies of 20,000*l.* and 5,000*l.*, so as to exonerate his personal estate from the payment of them. The language of the will is quite peculiar. The testator gives all his personal estate to his wife, and charges his real estates with the payment of his funeral and testamentary expenses and debts. Then he exempts his personal estate from those expenses and debts. But, after giving the two legacies by an independent gift, and charging his real estates with
[*225] the payment of them, *he does not do, with respect to them, as he had done with respect to his funeral and testamentary expenses and debts, that is, he does not exempt his personal estate from the payment of them. It is to be presumed, therefore, that he did not intend to exempt his personal estate from the payment of those legacies. In *Bootle* v. *Blundell*,(*a*) Lord Eldon, C., says: "I agree that it is not enough that the testator has charged the real estate, to show that he intended to discharge the personal.* * * * I can find no rule deducible from all that has been said on the subject, but this, (which appears to be a rule supported by all the cases taken together,) namely, that since it has been laid down that express words are not necessary to exempt the personal state, there must be, in the will, that which is sometimes denominated, 'evident demonstration,' sometimes, 'plain intention,' and 'necessary implication,' to operate that exemption. * * * * Then it comes to this. Upon each particular case, as it arises, the question will be, does there appear, from the whole testamentary disposition taken together, an intention, on the part of the testator, so expressed as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal? For it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided."

These two legacies are not payable until a future time. They do not, however, carry interest in the meantime: and, consequently, no inference can be drawn, in favor of their being pay-

(*a*) 1 Mer. 193. See pages 216, 219, and 230.

able only out of the real estate, from the circumstance that there is a provision made, for the maintenance of the legatees, out of the real estates, until their legacies become payable.

*Next, with respect to the other question; that is, whether the arrears of the allowances are to considered as a debt and to be raised out of the real estate. [*226] I submit that they cannot be considered as a debt; for the Great Seal has no power to contract a debt on behalf of the lunatic. [THE VICE-CHANCELLOR: Have the committees any balance in their hands in respect of the rents?]—Yes. On the 29th of September, 1839, rents became due to an amount sufficint to pay the allowances; but, as is usual, those rents were not paid until two or three months afterwards; and they were then received by the receiver appointed in the lunacy.

Mr. *Jacob*, in reply:—The gift of the personal estate is not a residuary, but a specific gift. It is a gift of, "all my goods, chattels, &c." Then follows the gift of the legacies: and, as there was no fund for payment of them, the testator says immediately afterwards: "And I hereby charge all my real estate with the payment of the said several sums." Then he directs the trustees of his will, not his executors, in case his wife shall die during the minority of the legatees, to levy and raise, for their maintenance and support, not exceeding four per cent. upon the provisions intended to be made for them. Those words, "levy and raise," are applicable not to personal estate, but to real estate; and when the testator disposes of his real estate, he gives it, "subject to the charges hereinbefore mentioned." I submit, therefore, that the legacies are clearly charged on the real estate; and that the personal estate is exonerated from payment of them by a prior, specific gift of it. The case of *Michell* v. *Michell* is precisely like this. The rents which were due at the testator's death, were part of his personal estate, and, as such, they passed to his widow, the *specific legatee of the per- [*227] sonal estate. All that is to be paid, is to be paid out of the property on which the burden is thrown: therefore, the plain-

tiff in entitled to he paid the arrears of the allowances out of the real estate.

THE VICE-CHANCELLOR:—With respect to the maintenance, I think that it stands thus: there was no right, in the committee, to receive any payment for the maintenance of the lunatic, any further than as it might be made out of the rents and profits; that is, the committee was not otherwise entitled, than as there might be rents and profits applicable to the payment of the maintenace. Now the rents which were due at the testator's death, were, strictly speaking, part of his personal estate; and if lady Jones says that the rents are personal estate, and that they belong to her as such, the consequence is that there is nothing to pay the maintenance out of. She cannot say that she will take the rents, and that the order in the lunacy created a debt due to her. It in no sense created a debt, otherwise than as there was a fund to pay the maintenance; and, if there was no fund, there was no debt.

The legatees of the 20,000*l.* and 5,000*l.* can only claim their legacies out of the real estates on which they are expressly charged. There is a distinction between the case of a creditor and the case of a legatee which is not always sufficiently attended to, and which makes the propositions which are laid down by text-writers, and which are found, in the reports, with respect to the one class of claimants, inapplicable to the other class. A creditor has a claim by operation of *law; but a legatee can only claim his legacy in the manner and form in which it is given by the will.

[*228]

The testator, at the commencement of his will, after giving directions respecting the place of his burial, says: "I give and bequeath unto my wife, absolutely, all my goods, chattels and personal estate whatsoever, wheresover and of what nature or kind soever." That gift is as much a specific gift as if he had enumerated every chattel, and then said: "I give them to my wife."

Then, with respect to the debts. The testator seems to have been aware that, by law, they would be payable out of his personal estate; and, therefore, after charging his real estates with the payment of them, he adds: "And I hereby exempt, so

far as I am able, all my personal estate from the payment of the same or any part thereof." Then he says: "I give, devise and bequeath"—the use of the word *devise* is singular—" to my natural son, C. T. Jones, the sum of 20,000*l.*, and to my natural daughter, Eliza Jones, the sum of 5,000*l.*; and I hereby charge all my real estate with the payment of the said several sums." Then he directs that in case his wife should die during the minority of the legatees, the trustees of his will, their heirs and assigns, should raise, out of the rents of his real estates, or by such other means as they might deem expedient, such annual sums for the maintenance of the legatees as should not exceed four per cent. per annum upon the respective provisions intended to be made for them. Now it is obvious that there would be an incongruity in saying that the legacies should be paid out of the personal estate, and that the interest of them should be paid out of the real estate.

*For these reasons, I think that lady Jones takes the personal estate free from the obligation of paying the debts and legacies.(*a*) [*229]

Beevor *v.* Partridge.

1840: 6th November.

Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply and dispose of all the interest thereof for the maintenance, support and benefit of his three children and the survivors and survivor of them, in such shares and proportions, and in such manner as they should think most proper and advisable; and, if all the children should die without leaving issue, then that the trust-fund should remain vested in two of the trustees, in trust for the persons thereinafter mentioned. Held, that the whole income of the residue was given for the children's benefit, and, the trustees having applied only part of it for their benefit, that the surplus devolved, on the survivor's death, to his personal representative.

Robert Partridge, by his will, dated the 20th of January, 1789, gave all the residue of his personal estate, after payment

(*a*) See *Carter* v. *Beard*, ante, Vol. X. p. 7.

of his debts and funeral and testamentary expenses, to three trustees in trust to invest the same in the usual securities, and out of the interest, dividends, and annual produce thereof, to pay an annuity of 12 guineas to Ann Simpson for her life, and another annuity of the same amount to Ann Blackmore for her life; and upon further trust to pay, apply and dispose of all the rest and residue of the said interest, dividends and produce of the said trust-money, for the maintenance, support and benefit of his (the testator's) son Robert, and his (the testator's) daughters, Lydia and Mary, and the survivors and survivor of them, in such shares and proportions, and in such manner as his trustees and executors, or the survivors or survivor of them, his executors or administrators, should think most proper and advisable; and upon further trust to lay out all or any part or parts of
[*230] the trust-money as they should *think proper, in the purchase of any annuity or annuities for and during the term of the natural life or lives of all or any of his said son and daughters, and to be secured to be paid by government or real security to them, his said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, in trust to be by them paid, applied and disposed of for the maintenance, support and benefit of his said son and daughters, and the survivors or survivor of them, as he had thereinbefore directed the said interest, dividends and produce to be paid, applied and disposed of: and upon further trust, in case all or any of them his said son and daughters should happen to marry with the consent and approbation of the trustees, or the survivors or survivor of them, or the executors or administrators of the survivor of them, then he empowered the trustees, and the survivors and survivor, and the executors or administrators of such survivor, previous to and in consideration of such marriage or marriages, to settle or pay, or agree to settle or pay any sum or sums of money, part of the said trust-money, to, upon and for the portions, provisions and benefit of his son and daughters respectively, and the respective person or persons with whom they should respectively marry, and the child or children of such marriage or marriages respectively, or any of them, in such

manner and form as the trustees, or the survivor or survivors of them, or the executors or administrators of such survivor, should, from time to time, think proper; and upon further trust, in case his said son or daughters, or any or either of them, should marry without such consent as aforesaid, and should leave any child or children living at their respective deaths, that the trustees or the survivor or survivors of them, his executors or administrators, should pay and apply such parts and shares of the said *trust-money as should then happen to be undisposed [*231] of, to and for the use and benefit of such child and children, as the trustees should think proper; and in case his said son and daughters should all of them depart this life without leaving any child or children, or leaving such child or children, and all of them should depart this life under the age of 21 years, then he declared that B. G. Dillingham, who was one of the trustees, should no longer continue a trustee of the trust-money, but that the same should be and remain vested in the two other trustees, and the survivor of them, his executors and administrators, upon the trusts thereinafter mentioned. The testator then declared trusts of the trust-money in favor of certain of his relations and connections, and their children.

The testator died on the 11th day of March, 1802, leaving his three children named in his will, his only next of kin him surviving.

His daughter, Mary, died on the 29th of September, 1831; his daughter Lydia, on the 13th of June, 1836, and his son Robert, on the 13th of March, 1839. They were all of unsound mind.

The trustees did not apply the whole income of the trust-fund for the benefit of the children; so that, at Robert's death, there was in their hands a considerable sum arisen from the surplus income: and, that sum having been claimed by the personal representative of Robert and his sisters, and also by the persons entitled under the ultimate trust in the testator's will, the bill in this cause was filed, by the trustees, for the purpose of having the rights of the several claimants to *the sum [*232] in dispute, ascertained and declared by the Court.

Mr. *Jacob* and Mr. *Phillips* appeared for the plaintiffs:

Mr. *Knight Bruce* and Mr. *Metcalfe*, for the personal representative of the three children, said the will did not give, to the trustees, a mere simple power to apply the income of the trust-fund, for the benefit of the testator's children, but a power which it was the duty of the trustees to exercise: that they were directed to apply all the dividends for the benefit of the children, and not such part of the dividends as they might think proper: that the whole income was to be applied, and the only discretion given to the trustees, was as to the shares in which it was to be applied. *Harding* v. *Glyn*;(a) *Brown* v. *Higgs*;(b) *Barber* v. *Barber*.(c)

Mr. *Sharpe*, for one of the next of kin of Robert Partridge, cited *Webb* v. *Kelly*.(d)

Mr. *Girdlestone* and Mr. *Teed*, for some of the parties claiming under the ultimate trust in the will, said that there was no gift of the income of the trust-fund to the testator's children, beyond what the trustees might, in their discretion, think fit to apply for their benefit.—[THE VICE-CHANCELLOR: Suppose that the trustees had declined to exercise any discretion at all.]—Then this Court would have been applied to, to fix the amount which ought to be applied for the benefit of the children. The [*233] *testator's sole object was to provide for the personal benefit and support of his children; and he has left the amount of the provision, to the discretion of the trustees. *Macdonald* v. *Bryce*.(e) There is no substantial difference between that case and the present.

Mr. *Wigram* and Mr. *Collyer*, appeared for the other parties claiming under the ultimate trust.

(a) 1 Atk. 469; and 5 Ves. 501: and 8 Ves. 571.
(b) 4 Ves. 708.
(c) 3 Myl. & Craig, 688.
(d) Ante, Vol. IX. p. 469.
(e) 2 Keen, 276 and 517.

1840.—Beevor v. Partridge.

THE VICE-CHANCELLOR:—The effect which ought to be given to the language, used by this testator, appears to me to be sufficiently plain.

In the first place, when the testator uses the words: "Upon trust to pay, apply and dispose of all the rest and residue of the said interest, dividends and produce of the said trust-money for the maintenance, support and benefit of my son Robert, and my daughters, Lydia and Mary, and the survivors and survivor of them;" he creates an express trust to apply the dividends for the benefit of his three children and the survivors and survivor of them. He then goes on to prescribe the mode in which the income of the trust-fund shall be applied for their benefit, and says: "in such shares and proportions, and in such manner as they, my said trustees, or the survivors or survivor of them, his executors or administrators shall think most proper and advisable." Those words give, to the trustees, a discretionary power as to the distribution only of the income of the trust-fund; but do not revoke or in any manner abridge the previous gift.

*In the course of the argument, I asked what would [*234] have been done (assuming that there was no gift,) if the trustees had refused to exercise the discretionary power given to them. The answer was that the Court would have interposed and exercised it for them. But how could the Court exercise the discretion, if there was no gift?

My opinion is that there is, by this will, a gift of the income of the trust-fund to the three children, with a power, to the trustees, to modify the distribution of it, and that whether they exercised that power or not, the gift would remain.

I shall, therefore, declare that the fund arisen from the surplus dividends of the trust-fund, belonged to the testator's son Robert, as the survivor of the three children.

[*235] *WARDE *v.* FIRMIN.

1840: 6th, 7th, 9th and 21st November.

Under a marriage settlement, a sum of consols was held in trust for the husband for life, remainder, as to a certain portion of it, for the wife for life, remainder for such one or more of the children as the husband and wife should appoint, remaindor for the children at 21; and, as to the rest of the consols, in trust, after the husband's death, for the children, absolutely, at 21. There were five children who attained 21. Their parents, conceiving that they had power to appoint the whole of the consols, made appointments, at different times, to two of them, which more than exhausted that portion of the consols which was appointable. Each deed of appointment declared that the appointee should not be entitled to any further or other share in the trust-fund under the settlement, until he should have put in hotchpot the thereby appointed share; unless a contrary intention should be expressed in the instrument by which any further appointment should be made. Held that, though the appointable part of the consols was nor sufficient to answer, fully, the second appointment, yet there was to be no apportionment, and that the second appointee as well as the first, was prevented, by the hotchpot clause, from taking any part of his one-fifth of the unappointable consols, unless he would give up the whole of what he would get under the appointment; and that the unappointable consols belonged, wholly, to the three other children.

BY an indenture dated the 10th of May, 1793, being the settlement made in contemplation of the marriage of Peter Firmin with Jane Master, certain sums of bank stock, and of four per cent. and three per cent. stock, the lady's property, were assigned to trustees, in trust for the intended husband and wife, for their lives, and, after the decease of the survivor of them, in trust for all and every, or such one or more of the children of the marriage, at such times, and in such shares, &c., as the intended husband and wife should, during their joint lives, appoint, and, in default of such appointment, as the survivor of them should appoint, and, in default of such appointment, in trust for the children of the marriage, who, being sons, should at-
[*236] tain 21, or, being *daughters, should attain that age or marry under it, equally to be divided amongst them: and Peter Firmin conveyed certain freehold hereditaments to the trustees, to the use of himself for life, and, after his decease, in trust to sell the same, and to invest in the usual securities, so

much of the proceeds as would be sufficient to produce a clear annual income of 400*l.*, and to stand possessed of the securities in trust, out of the income thereof, to pay an annuity of 200*l.* a year to Jane Master during her life, and, as to the residue of the securities which should be so purchased, and should be more than sufficient to pay the annuity, in trust for all and every, or such one or more of the children of the marriage, as, being sons, should attain 21, or, being daughters, should attain that age or be married under it, and to be vested interests in them at such ages or times respectively: and, as to so much of the securites to be so purchased as aforesaid, as should be necessary for answering the annuity of 200*l.* a year, in trust for such child or children of the marriage, in such manner, &c., as therein, and hereinbefore mentioned, concerning the fortune of Jane Master, after the decease of her, and her intended husband: and the trustees were empowered, with such consent as therein mentioned, to change the trust-funds for other securities of a like nature: and it was provided that in case Peter Firmin should, at any time during the joint lives of himself, and his intended wife, purchase, in the names of the trustees, so much stock, in any of the public funds, as would produce the annual sum of 400*l.*, to be held in trust for himself for life, and, after his decease, upon the trusts before mentioned, concerning such part of the proceeds of the real estates directed to be sold as was directed to be laid out in the purchase of stock or other securities, then the trusts before mentioned concerning such *real [*237] estates, should cease. And it was declared that the stocks or funds to be purchased by P. Firmin as aforesaid, might be varied, from time to time, in such manner as was thereinbefore declared concerning the moneys and property thereby settled.

After the marriage, Peter Firmin, in pursuance of the aforesaid provision in the settlement, purchased, in the names of the trustees, 13,333*l.* 6*s.* 8*d.* three per cent. stock, being the amount of that stock required to produce the annual sum of 400*l.*; and consequently, one half of that stock, that is, 6,666*l.* 13*s.* 4*d.*, was required to answer Mrs. Firmin's annuity of 200*l.* a year.

1840.—Warde v. Firmin.

By a deed-poll dated the 12th of November, 1821, Mr. and Mrs. Firmin, in contemplation of the marriage of their daughter, Louisa, with G. S. Sadler, after referring to the settlement, appointed, after the decease of the survivor of themselves, and subject to their life-interest therein, 4,200*l.* three per cents. part of the funds comprised in or subject to the trusts of the settlement, to Louisa, her executors, &c., subject to the proviso that she should not be entitled to any further or any share in the trust-funds under the settlement, until she should have put in hotch-pot the thereby appointed share; unless a contrary intention should be expressed in the instrument or instruments whereby any further or other appointment or appointments should be made.

By the settlement on the marriage of Mr. and Mrs. Sadler, dated the 13th of November, 1821, and to which Mr. and Mrs. Firmin were parties, Mrs. Sadler assigned the 4,200*l.* three per cents. to trustees, upon the trusts thereby declared. This [*238] deed recited that certain sums *of stock therein mentioned(*a*) were then standing in the names of the trustees of Mr. and Mrs. Firmin's settlement, in trust to pay the dividends thereof to Mr. Firmin for life, and, after his decease, to Mrs. Firmin for her life, and after the decease of the survivor of them, in trust, to transfer the capital to, and between all and every or such one or more of their children, at such times &c., as they should appoint, and, in default of such appointment, then as the survivor of them should appoint, and, in default of such appointment, in trust, for such of their children, as being sons, should attain 21, or being daughters, should attain that age or marry under it.

By a deed-poll dated the 24th of December, 1821, after referring to the settlement of the 10th of May, 1793, Mr. and Mrs. Firmin, in execution of the power thereby reserved to them, appointed, after the decease of the survivor of them, and subject to their life-interest, 4,200*l.* three per cents., part of the funds comprised in, or subject to the trusts of the settlement, to Har-

(*a*) These sums where the whole of the stock comprised in Mr. and Mrs. Firmin's settlement. It will be observed that the above recital was incorrect.

court Firmin, another of their children, who had attained 21, his executors, &c.: subject to a proviso similar to that contained in the preceding deed-poll.

By an indenture of the 26th of December, 1821, Harcourt Firmin settled, on his marriage, the 4,200*l.* stock appointed to him as before mentioned: and that indenture contained a recital, in the same terms as the recital, before noticed, in Mrs. Sadler's settlement.

*The whole amount of three per cent. stock which Mr. [*239] and Mrs. Firmin had power to dispose of under their settlement, was 7,618*l.* 1*s.* 6*d.*, which was composed of that moiety of the 13,333*l.* 6*s.* 8*d.* three per cents. which was required to pay Mrs. Firmin's annuity, and of another sum of the same stock which was part of her fortune; so that, by the foregoing deeds, she and her husband appointed a larger amount of three per cents. than they had power to dispose of.

Mr. Firmin died in December, 1826.

By a deed-poll dated the 18th of December, 1827, Mrs. Firmin, after referring to her settlement, appointed, in execution of the powers reserved to her thereby, certain sums of bank and four per cent. stock, part of the funds comprised in or subject to the trusts of that settlement, to Robert Firmin, another of the children of the marriage who had attained 21, his executors, &c., in trust for his brother Harcourt.

By a deed-poll dated the 10th of September, 1829, after reciting that certain sums of stock therein mentioned(*a*) were then standing in the names of the trustees of Mr. and Mrs. Firmin's settlement, in trust, after her decease, for the benefit of the children of the marriage as Mr. and Mrs. Firmin jointly, or the survivor alone should appoint, and, in default of appointment, for such children, equally, at the times therein specified; and after further reciting the then intended marriage of Robert Firmin: Mrs. Firmin, in exercise of the powers reserved to her by her settlement, appointed, after her decease but subject to her life-interest therein, two sums of three per cent. stock (mak-

(*a*) See note, ante, p. 238.

[*240] ing together 4,200*l.* of that *stock,) part of the said trust-funds, to Robert Firmin, his executors, &c., subject to a proviso similar to that contained in the first-mentioned deed-poll.

By an indenture dated the 1st of May, 1830, after reciting, with respect to the trust-funds, as in the preceding deed, Mrs. Firmin, in execution of the powers reserved to her by her settlement, appointed certain sums of bank and four per cent. stock, part of the trust funds after her decease and subject to her life-interest therein, to Mrs. Sadler, her executors, &c.: and, by the same deed, Mrs. Firmin appointed certain other sums of like stock, other part of the trust-funds, after her decease and subject to her life-interest therein, to Robert Firman, his executors, &c.: and it was thereby provided that Robert Firmin or Mrs. Sadler, or either of them, should not be compelled to bring into hotchpot the several shares appointed to them thereby and by virtue of the deeds of the 11th of November, 1821, the 18th of December, 1827, and the 10th of September, 1829, or any of them; but that they should not respectively be entitled to any further shares of the trust-funds under the settlement, unless or until they should have put into hotchpot the shares thereby and by the last-mentioned deeds respectively appointed; unless a contrary intention should be expressed in the instrument or instruments whereby any further appointments should be made to them respectively.

By another deed, also dated the 1st of May, 1830, after reciting with respect to the trust-funds as in the two last-mentioned deeds and that Mrs. Firmin, being desirous of making a provision for Sophia Firmin (another of her children by her late husband who had attained 21,) had determined to appoint, to

[*241] Sophia Firmin, *the several sums thereinafter mentioned, she, in execution of the powers reserved to her by the settlement, appointed, after her decease, but subject to her life-interest therein, the sum of 1,902*l.* 15*s.* three per cents., and also certain other sums of stock, part of the trust-funds, to Sophia Firmin, her executors, &c.; subject to the proviso similar to that contained in the first-mentioned deed-poll.

Georgiana, another child of Mr. and Mrs. Firmin, attained 21, and died in 1822.

Mrs. Firmin, from the decease of her husband until her own death, received the whole of the dividends of the three per cent. stock comprised in her settlement. She died in December, 1836.

The bill was filed by the trustees of Mr. and Mrs. Firmin's settlement, against their surviving children and the personal representatives of their deceased child Georgiana Firman, and also against the trustees and *cestuis que trust* under the settlements which had been executed by the children as before mentioned.

The bill alleged that, from the recitals contained in Mr. and Mrs. Sadler's settlement dated the 13th of November, 1821, it appeared that, at the time of the execution thereof and of the deed-poll of the 12th of November in the same year, Mr. and Mrs. Firmin, and the other parties who executed the last-mentioned settlement, erroneously believed that the power of appointment amongst the children of Mr. and Mrs. Firmin, which, by the settlement on their marriage, was given to them and the survivor of them, extended to the whole *of the stocks, [*242] funds and securities comprised in that settlement; and that that part of the trusts of the same settlement whereby it was provided that the residue of the stocks, funds and securities which should be perchased with the moneys to arise from the sale of the freehold hereditaments thereby conveyed, and which should be more than sufficient to satisfy the annuity of 200*l.* therein mentioned, should, after the decease of Mr. Firmin, be held in trust for the children of Mr. and Mrs. Firmin and not subject to any power of appointment by them or either of them, was entirely overlooked by the parties to Mr. and Mrs Sadler's settlement, and that the sum of 14,284*l.* 14*s.* 10*d.* three per cent. annuities, was, by error, inserted in Mr. and Mrs. Sadler's settlement instead of the sum of 7,618*l.* 1*s.* 6*d.* like annuities, such last-mentioned sum being the amount of three per cent. stock to which, under the trusts of Mr. and Mrs. Firmin's settlement, the power of appointment given to them extended. The bill further stated that the several appointments which were made by Mr. and Mrs. Firmin, and by Mrs. Firmin after her husband's death as be-

fore mentioned, had exhausted the whole of the stocks, funds and securities held by the plaintiffs upon the trusts of Mr. and Mrs. Firmin's settlement, and left no part thereof to satisfy the trusts thereby declared of such of the same stocks, funds and securities as should be more than sufficient to satisfy and discharge the annuity of 200*l.*: that the defendants who were interested under the appointments before mentioned, had, since Mrs. Firmin's death, required the plaintiffs to divide, pay and transfer the trust-funds, pursuant to and in conformity with such appointments; but that the plaintiffs had declined so to do, they having been [*243] advised that, under the circumstances appearing *in the bill, they could not safely act in the premises except under the direction and indemnity of the Court.

The bill prayed that the trusts of Mr. and Mrs. Firmin's settlement might be carried into execution under the decree of the Court, and that the rights and interests of all parties in the sums of stock comprised in that settlement, might be ascertained and declared by the Court, and that those several sums might be applied accordingly.

The cause was heard on the 30th of June, 1838; and, by the decree then made, the Master was directed to inquire and state whether Mr. and Mrs. Firmin, or Mrs. Firmin, after her husband's death, had made any and what appointments of the trust-funds comprised in their marriage settlement, and to make several other inquires, with a view to enable the Court to decide as to the rights of the parties. The Master having made his report, the cause now came on to be heard for further directions.

The principal question in the cause was what effect ought to be given to the appointments which had been made to Mrs. Sadler, Harcourt Firmin, Robert Firmin and Sophia Firmin, having regard to the fact that Mr. and Mrs. Firmin had attempted to appoint the whole of the three per cent. stock comprised in their settlement; whereas they had no power over the sum of 6,666*l.* 13*s.* 4*d.* part of that stock, that sum being settled in trust for their children who, being sons, should attain 21, or, being daughters, should attain that age or marry; in consequence of which, Georgiana Firmin (to whom no appointment had been

made) had acquired, under the settlement, a vested interest in one-fifth part of the *6,666*l.* 13*s.* 4*d.* three per cents., which, on her death, devolved to the defendant, Gadsden, her personal representative. [*244]

Mr. *Chandless* and Mr. *Faber* appeared for the plaintiffs.

Mr. *Jacob* and Mr. *Piggott*, for Harcourt Firmin and his wife, and Mr. *Girdlestone* and Mr. *Evans*, for their children, said that the appointment to Harcourt Firmin was not an appointment of 4,200*l.* part of the specific sum of three per cent. stock comprised in Mr. and Mrs. Firmin's marriage settlement; but an appointment, generally, of 4,200*l.*, part of the trust funds: that unless the 4,200*l.* three per cents. was to be made good out of the trust-funds generally, the whole of the three per cent. stock might have been sold out, under the power, in the settlement, to change securities, and the proceeds invested in some other stock; in which case there would have been no fund at all to answer the appointment at the death of Mrs. Firmin: and, indeed, as the funds then existed, there was not sufficient three per cent. stock to answer the appointments which had been made, supposing that they were taken to be appointments of portions of the specific sum of that stock comprised in the settlement: that the trust-funds were of a fluctuating nature during the lives of Mr. and Mrs. Firmin; and it was, therefore, clear that the appointments were to be made good out of the trust-funds generally, as they might be found at the deaths of Mr. and Mrs. Firmin.

The next question is what is the effect of the hotchpot clauses, that is, whether they apply to that portion of the trust-funds which was subject to the power, or to that portion which was not subject to the power. We *confidently submit that every one who looks at those clauses must see that they apply to that portion only of the trust-funds which was subject to the power: and, that being so, Harcourt Firmin and those who claim under him are entitled not only to the whole of what was appointed to him, but also to one-fifth of the stock which was not subject to the power. [*245]

It will be, perhaps, contended that this is a case in which the appointees ought to be made to elect whether they will take under the appointments made to them respectively, or under the settlement as if no such appointments had been made, and *Robinson* v. *Bransby*(*a*) will be cited in support of that argument. That case, however, has no application to the present; for there the judgment of Sir John Leach, V. C., was founded on the intention of the testator as distinguished from mistake: this, however, is not a case of intention but of mistake, as clearly appears from the recitals in several of the deeds set forth in the Master's report.

Mr. *Stuart* and Mr. *Colville*, for the trustees of Harcourt Firmin's marriage settlement.

Mr. *Wigram* for Robert Firmin, said that it appeared to have been the intention of Mr. and Mrs. Firmin to equalize the funds amongst the appointees as nearly as might be; and, therefore, the appointable portion of the three per cents. ought to be divided amongst the appointees in proportion to the share appointed to each.

Mr. *Simpson*, with Mr. *Wigram*, cited *Robinson* v. *Bransby*, and *Daubeny* v. *Cockburn*.(*b*)

[*246] *Mr. *Hetherington* for the trustees of Robert Firmin's marriage settlement.

Mr. *Sidebottom* and Mr. *Teed* for Mr. and Mrs. Sadler, and their children, contended that the appointment made to Mrs. Sadler, in November, 1821, was not meant to take effect out of the trust-funds generally, but out of the specific sum of three per cent. stock, which was comprised in Mr. and Mrs. Firmin's settlement: that the appointment was the first that was made, and consequently Mr. and Mrs. Sadler, and their children, as

(*a*) Madd. & Geld. 348. (*b*) 1 Mer. 626.

claiming under them, were entitled to the full benefit of it, and were not liable to contribute to make good the subseqent appointments.

Mr. *Koe*, for the trustees of Mr. and Mrs. Sadler's marriage settlement.

Mr. *Knight Bruce* and Mr. *Bellamy* for Sophia Firmin, contended that the appointable portion of the three per cent. stock, ought to be divided amongst the different appointees in proportion to the shares of that stock appointed to them.

Mr. *Cooper*, for R. Gadsden, the executor of Georgianna Firmin, claimed one-fifth of that portion of the three per cent. stock, which was not subject to the power.

THE VICE-CHANCELLOR:—The question is, what is the effect of the several instruments which were executed by Mr. and Mrs. Firmin, jointly, and by Mrs. Firmin alone after her husband's death.

The first is the appointment of the 12th of November, 1821. It is very probable that there may have been a mistake *in the minds of the parties who executed the power of [*247] appointment, at the time when they executed that deed of the 12th of November, 1821; but if, in point of fact, they had such a power as would enable them to make the appointment which they then did, no question arises upon that deed. At the time when the deed of the 12th of November, 1821, was executed, the father and mother had a joint power of appointment over so much of the three per cents., as would enable them to appoint a sum of 4,200*l* to Mrs. Sadler. It is true that they might have conceived that their power did extend further than it really did: but the fact that they conceived that their power extended further, does not furnish any reason why, if their power did extend so far as it was intended to take effect, that instrument should not take effect to its full extent: and it seems to me to be quite impossible to say that, because there was a

mistake, by the parties, as to the extent of their power, therefore the instrument shall not take effect, when, in point of law it could take effect. If it is not to take effect to its full extent, is it to take effect partially, or is it to be wholly set aside? Constituted as the case is, there is no other alternative. My opinion is, after attending to all I have heard, that Mrs. Sadler is entitled, under the appointment of the 12th of November, 1821, to the sum of 4,200*l.* three per cents.

It would be a very strange construction to say that the 4,200*l.* three per cents., is to be raised out of all the funds, generally, which were subject to the power, and not out of that portion of the three per cents. which, according to the true construction of the settlement of 1793, was subject to the joint power of appointment.

[*248] *There is one more observation which I have to make upon this part of the case. It appears from the recitals in the deed of the 12th of November, that the appointment made by it, was made in contemplation of Mrs. Sadler's marriage and of the settlement to be made on that occasion, that is, of the deed of the following day: but, if the reference in the deed of the 12th, to the deed of the 13th, is to have the effect of introducing the recitals in the latter deed into the former, still it could not, in the least, prevent the deed of the 12th November from operating in the way in which it stands. I might indulge in a supposition that, if the parties had been aware of what they were about, they might not have done exactly what they did. But if I find they had an intention to do that which, by virtue of the power, they actually could do, it appears to me that I am not justified in saying that it shall not take effect merely because, by that mode of reference, it appears they misconceived the actual extent of their power. Then, with respect to the effect which ought to be given to the hotchpot clause which is inserted in this instrument of appointment. Let us take the words as they stand: "Provided always and it is the true intent and meaning of these presents, and of the said Peter Firmin, and Jane his wife, that the said Louisa Firmin shall not be entitled to any further or other share or shares, of or in the

said trust-moneys, stocks, funds and securities, under the said settlement, or the dividends, interest and income thereof, until she, the said Louisa Firmin, shall have put in hotchpot the said bank annuities, part of the said trust-moneys, stocks, funds, and securities, so directed and appointed in her favor as aforesaid, unless a contrary intention shall be expressed in the instrument or instruments, whereby any further appointment or appointments shall be made." To be sure, *as it stands, [*249] an intention with respect to her might have been expressed in some instrument of appointment which did not relate to her in the way of appointing to her; but I do not think much turns upon that: the question is whether the clause of hotchpot does not extend, in its terms, to all the funds: and my opinion, in the first place, upon the terms of the deed, is that it clearly does extend to the whole of the funds; and, if you look into the circumstances which are developed, and take into consideration the fact, that the parties who executed this instrument, did really suppose that the power extended to the whole of the three per cent. stock, as well as to all the other trust-funds, there can be no doubt about the meaning of those words. I admit, if it was shown, on the face of this instrument, that there was a clear knowledge, on the part of the parties who executed the power, that their power extended to some part, only of the three per cents., and did not extend to the remainder, there might have been some difficulty in assigning to those words their natural meaning; but, as the instrument stands, and as we know the fact to be with respect to the conception of the parties as to the extent of their power, my opinion is, that no question arises on these words, and that the express terms of the hotchpot clause do apply to any instrument by virtue of which Mrs. Sadler might subsequently take any share of the trust-funds.

Next, with respect to Harcourt Firmin. The parties having appointed 4,200*l.* of the three per cents., and having no power of appointing so much as a further sum of 4,200*l.* of that stock, did, nevertheless, take upon themselves to appoint that further sum, under the impression that they had the power so to do. The language of this instrument is so identically the same

[*250] *as the language of the instrument of the 12th of November, that I am not at liberty to put any other construction upon it than this, namely, that it shall be good to the extent to which there was a fund to answer it; and, therefore, so much of the 7,618*l.* 1*s.* 6*d.* three per cents., as was not included in the appointment to Mrs. Sadler, became duly appointed, by means of this instrument, to Harcourt Firmin.

Then the next question applies to Robert Firmin.—As I understand the appointment to Robert, it is in precisely the same terms, as far as the appointment goes, as the preceding appointment which had been made in the year 1821: and his father being dead, his mother professes to appoint to him 4,200*l.* three per cents. in two separate sums. However, his mother, at the time, had no such power of appointment: for it is an appointment of a portion of a specific fund; and, if there was no specific fund which could answer the appointment, I am not at liberty to say that the party making the appointment, meant to do any other thing than that which she really did. What I mean to say is, that so far as there was no fund on which the instrument could operate, the instrument must fail. If there be any fund on which the instrument could operate, it must take effect to that extent; but, as an instrument operating on the 4,200*l.*, it cannot take effect.

Then the next two appointments were simultaneous, on the 1st of May, 1831; and one of those appointments was to Mrs. Sadler and Robert Firmin: and that appointment was only of certain sums of bank and four per cent. stock, not interfering with any of the three per cents. And there is no question but that there might be a power exercised with respect to

[*251] those *funds, because they were derived from the wife's fortune, and therefore, that appointment to Mrs. Sadler and Mr. Robert Firmin will take effect, subject only to such operation as the hotchpot clauses in the previous oppointment, to them, would have.—[Mr. *Sidebottom:* The appointment to Robert Firmin and Mrs. Sadler annuls all the previous hotchpot clauses so far as those parties are concerned.]—The appointment of the 1st of May, 1830, to Mrs. Sadler and Mr. Robert Firmin

leaves them in possession of the sums appointed to them, but it still leaves the hotchpot clause in full force against the fund which was not appointable, and prevents them from claiming any portion of it. It has not been contended that they are not entitled to the benefit of the prior appointments. What I mean is that they cannot take under those appointments and come on the unappointable fund as well.

Lastly: with respect to Miss Sophia Firmin. She can take only those sums of bank, and four per cent. and reduced stock, which are mentioned in the appointment to her, and cannot claim anything in respect of 1,902*l.* 15*s.* three per cents. which are mentioned in the appointment to her

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After the judgment was delivered, a discussion arose as to the effect of it, with regard, principally, to the unappointable fund. In consequence of which his Honor ordered the cause to stand over until the 9th of November.

9th November.—Mr. *Knight Bruce*:—The effect of your Honor's judgment, as I understand it, is, that the appointments operate upon the appointable *funds only, and that the [*252] hotchpot clauses exclude the appointees from taking any part of the unappointable fund without bringing what was appointed them into hotchpot: and, if they do not do so, then the whole of the unappointable fund will belong to R. Gadsden, as the personal representative of Georgiana Firmin, the only one of Mr. and Mrs. Firmin's children in whose favor no appointment was made.

Mr. *Girdlestone*:—The effect of the judgment, as I understand it, is this. Mrs. Sadler takes the whole of the 4,200*l.* three per cents. appointed to her by the deed of November, 1821. The consequence is that there will not be enough left, of the appointable three per cents., to make up the 4,200*l*, appointed to Harcourt Firmin by the deed of December, 1821: therefore, he will be entitled to have the deficiency made good to him out of the unappointable fund: for, otherwise, he will not get that which

was the consideration for his giving up his fifth share of the unappointable fund.

Mr. *Evans*:—Where a party is made to elect whether he will take under or against a will, the estate that he gives up does not go to the heir, but to the party who otherwise would have been disappointed.—Suppose that Mrs. Sadler, for some reason or other, had elected to take her share of the unappointable fund, and to relinquish what was appointed to her; then there would have been sufficient, of the appointable fund, to answer Harcourt Firmin's appointment; and, as he is disappointed by her electing to take under the appointment to her, the necessary consequence is that what she gives up must be applied [*253] *to compensate Harcourt Firmin as far as he is disappointed.

THE VICE-CHANCELLOR:—If there is not enough left of the appointable three per cents. to make good, to Harcourt Firmin, the whole of the sum appointed to him, he must abide by the loss. The effect of a hotchpot clause is to make the other objects of bounty share in the property, to the exclusion of the appointee on whom that clause operates.

Mr. *Jacob*:—That is so where the clause applies to a fund the whole of which is subject to a power of appointment. But, here, there is a sum of 6,666*l.* 13*s.* 4*d.* three per cents. which is not subject to any power, and in which each of Mr. and Mrs. Firmin's five children acquired an absolute, vested interest. Now a hotchpot clause has a negative, not a positive operation: it cannot have the effect of giving, to any of the other children, that one-fifth of the 6,666*l.* 13*s.* 4*d.* three per cents. which was absolutely vested in Mrs. Sadler: nor could her parents have intended that it should so operate; for they either never knew or had forgotten that there was any portion of the trust-funds in which their children could take an absolute, vested interest: but they considered and dealt with the whole of the trust-funds as being appointable by them. I submit that the effect of the hotchpot clause, so far as regards the first appointment to Mrs. Sadler, is

that her one-fifth of the 6,666*l.* 13*s.* 4*d.* three per cents., must be taken by her in part of the 4,200*l.* of that stock appointed to her by the deed of November, 1821, that is, she must take 1,333*l.* and a fraction out of the 6,666*l.* 13*s.* 4*d.*, and 2,867*l.* out of the 4,200*l.*: and the remainder will be applied to make good the appointments to Harcourt Firmin and the other appointees of three per cents., who otherwise would have been disappointed. The hotchpot clause does not make any distinction between the two funds; but blends them together, and says that Mrs. Sadler shall not take, out of the aggregate fund, more than 4,200*l.* three per cents. That clause cannot be construed so as not only to make her give up her 1,333*l.*, but also to make it divisible amongst her brothers and sisters, there being no words to produce that effect. [*254]

THE VICE-CHANCELLOR:—I cannot tell what Mr. and Mrs. Firmin did or did not know. They have thought proper to use certain language, and I must take it as it stands. I have always understood the effect of a hotchpot clause to be this, namely, to prevent the party to whom it applies (in case he does not choose to bring into hotchpot what the deed gives him) from taking any further part of the trust-fund, and to give, to the other objects of the trust, that portion of the fund, which, but for the hotchpot clause, he would have taken. Mrs. Sadler, therefore, is excluded from taking any portion of the 6,666*l.* 13*s.* 4*d.*

Then, with respect to Harcourt Firmin. The instruments of appointment having been made, not at the same time, but in succession, they must operate so far and so far only, as there are funds to allow them to operate. Harcourt Firmin cannot obtain the whole of the 4,200*l.* three per cents. appointed to him, because there is not enough left of the appointable portion of that stock to answer, fully, the appointment to him. Nevertheless, he cannot say that he will take as much as he can get under the appointment, and yet not be bound under the hotchpot clause. [*255]

21*st November*.—The cause having been again ordered to stand over,

THE VICE-CHANCELLOR, on this day, said:—I cannot but think that it is not a satisfactory way of deciding on instruments to assume that something was the intention of the parties, when they themselves did not understand what they were about, and have used language throughout which shows, when it is applied to the real state of the funds, that they were altogether acting in error: and my opinion is that, in such a case, there is no method of construing the instruments, except by taking the words as we find them.

I do not very well see what the parties meant by putting in all these clauses of hotchpot, to the very end, even at the time when they had wholly appointed the funds to which their power extended: but, nevertheless, I will suppose they had some meaning. Then what is the meaning? As the words stand, they seem to me to place the appointees in such a situation that they must either choose to take what is appointed to them by the instruments, or, if they choose to take any other share, then they must not take under the instruments.

I do not think there is any substantial difference between the case of Mrs. Sadler, to whom an appointment was made at a time when the state of the funds happened to be such that she might, by virtue of the appointment, have the whole of [*256] what was *appointed to her, and the case of those with respect to whom the appointments were made under such circumstances as that they could not get the whole of what was expressed to be appointed to them: because it is not in the option of the appointee to take a part of the thing appointed, and then say: "Because I cannot get the whole, I am not bound by the hotchpot clause." The party is not at liberty to take under the appointment, without complying with the words which direct that, if he does take under the appointment (for that is the sense of it) he shall be excluded from taking any further share. Therefore, as in point of fact, there was some fund with reference to which the hotchpot clause might operate, (though the parties

who made the appointments might not have been fully aware of it,) yet I am bound, by the words, to say that those parties in whose favor appointments have been made, and who intend to take, by virtue of those appointments, what they can get out of the appointable fund, are excluded from participating in the unappointable fund.

The result is that Georgiana Firmin, who was the only one of the children to whom no appointment was made, and with respect to whom, therefore, no hotchpot clause is in force, takes the whole of the unappointable fund.

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*French *v.* French. [*257]

1840: 13th November.

Testator gave 5,000*l.* to his sons, in trust for his daughter Mrs. W., so as not to be subject to the debts, acts or control of her husband; and he gave the like sum to his daughter Mrs. A., in trust as aforesaid, for the use of herself and children. Mrs. A. had two children living at the testator's death. Held that they did not take either as joint-tenants or tenants in common with her; but that she was entitled to the whole income of the fund, for her life, for her separate use, with remainder to her children.

Mark Dyer French, the testator in the cause, by his will, dated the 16th of May, 1838, after directing that his just debts and funeral expenses should be paid, and reciting that he had lately caused to be transferred unto his daughter Maria, who had lately intermarried with Captain William Graham, the sum of 5,000*l.* three per cent. consols; to his daughter, Jane Camden, the like sum of 5,000*l.* stock; and to his son, the Rev. Mark Dyer French, the further sum of 5,000*l.* three per cent. consols, as and for their several portions out of his estate: gave and bequeathed unto his sons, Mark Dyer French and George French, in trust for his daughter, Mrs. Sarah Wilson, wife of John Wilson, Esq., the like sum of 5,000*l.*, so as not to be subject to the debts, acts or control of her said husband: and he gave and bequeathed unto his daughter, Margaret Anderson, wife of Alexander

1840.—French v. French.

Williams Anderson of the island of Trinidad, barrister at law, in trust as aforesaid, for the use of herself and children, the like sum of 5,000*l.* three per cent. consols; and, to his son, George French, the further sum of 5,000*l.* three per cent. consols: the last-mentioned 15,000*l.* to be paid and transferred at a convenient time after his decease, and as it might suit his executors hereinafter named. And, as to the rest and residue of his stock in the same fund, he directed that the same of 600*l.* annually should be paid and allowed unto his wife, Mary French, for and during her natural life; and, at her decease, he directed that whatever stock was standing in his name and the interest accu-
[*258] mulating thereon, should be distributed to *his aforesaid children: and he gave and bequeathed, to each of his grandchildren by his daughters Mrs. Sarah Wilson and Mrs. Margaret Anderson, annually, the sum of 25*l.* each, to be paid to them or the survivor of them, towards their education, by his executors thereinafter named: and, as to his real and personal property in the island of Tortola, he directed that the same should be sold, and that the money arising therefrom, should be invested in the same fund: and he appointed the persons therein named his executors.

Mr. and Mrs. Anderson had two children living at the testator's death, (both of whom were infants,) and one born subsequently, who died shortly after its birth.

A petition was presented by Mr. and Mrs. Anderson, praying that the rights and interests of Mrs. Anderson and her children, present and future, under the bequest for their benefit, might be ascertained. The petition now came on to be heard.

The question was whether Mrs. Anderson was entitled to the 5,000*l.* stock for her separate use for life, with remainder to her children, or whether she and her children were entitled to it as joint tenants or tenants in common.

Mr. *Jacob* and Mr. *James Parker*, in support of the petition, cited *Morse* v. *Morse*.(*a*)

(*a*) Ante, Vol. II. p. 485.

Mr. *Knight Bruce*, for the children, said that he was placed in a situation of some difficulty, as it would be better for the children, in some respects, to take after the death of their mother, than jointly with her.

*THE VICE-CHANCELLOR:—The testator first gives a [*259] legacy of 5,000*l.* stock, to his sons, in trust for his daughter, Mrs. Wilson, so as not to be subject to the debts, acts, or control of her husband; and then he gives a legacy to the same amount to his daughter, Mrs. Anderson, in trust as aforesaid, for the use of herself and children. The words, "in trust as aforesaid" clearly mean that the income of the fund should be paid to her for her separate use. Therefore the testator did not mean that the children should be let in to participate with their mother, but that she should take an interest in the fund, for her separate use, for her life, with remainder to her children. The effect of that construction will be to let in all the children, whether now born or hereafter to be born; whereas, if I were to hold that a joint-tenancy was created, the after-born children would be excluded.

[*260] *MORRICE *v.* LANGHAM.

1840: 14th and 16th November.

T. settled his estates (subject to a general power of appointment in himself,) on himself in tail, remainder to J. L. and his sons in strict settlement, remainder to L. C. for life, &c.: provided that if J. L., or any issue male of his body, should become entitled, in possession, to his father's family estates, then the uses before declared of T.'s estates, for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled, were dead without issue male. T., by his will, appointed his estates to J. H. L. (the eldest son of J. L.) and his sons in strict settlement, remainder to the heir of H. H. deceased: provided that if any tenant for life in possession under the will, should become entitled, in possession to J. L.'s family estates, his interest in the devised estates, should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator then gave all the rest and residue of his real and personal estates, to A. H. S., his executors, &c. J. L. became entitled in possession to his father's family estates in the testator's life. The testator died in 1824; upon which, J. H. L. entered upon his estates under the will. J. L. died in 1833, upon which J. H. L. became entitled in possession to the family estates. He had no son. The rents of T.'s estates, accruing between 1833 and J. H. L.'s death or his having a son, were claimed by A. H. S. as being appointed to him by the residuary clause: and L. C., and H. L. (the second son of J. L.) claimed them, adversely to each other, under the limitations, in default of appointment, in T.'s settlement. The Court decided against A. H. S.'s claim; and at the request of counsel, sent a case to law, as to the claims of L. C. and H. L., notwithstanding the legal interest in T.'s estates was vested in trustees, and the Court had very little doubt upon the question.

BY an indenture dated the 12th of April, 1804, and by a fine and recovery, Francis Tutte conveyed the manors of Goate and Belhurst, in Sussex, together with divers farms and other hereditaments in that county, to the use of such person and persons, and for such estate and estates as he should, by deed or will, appoint, and, in default of appointment, to the use of himself in tail, with remainder to the use of James Langham, Esq., afterwards Sir James Langham, bart., therein described as
[*261] the second son of Sir James Langham of Cottesbrook *in the county of Northampton, bart., deceased, for his life, with remainder to the use of trustees during the life of James

Langham, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of James Langham, successively, in tail male, with remainder to Langham Christie, Esq., for his life, with divers remainders over: and in the indenture was contained a proviso in the words following: "Provided always, and it is hereby agreed and declared, by and between the parties to these presents, to be the true intent and meaning of them and of these presents, that, in case the said James Langham, or any issue male of his body, shall become entitled to the possession, or to the receipt of the rents and profits of the family estates late of the said Sir James Langham, deceased, to the amount of 1,000*l.* per annum, over and above all outgoings and reprises, then and in every such case the use, limitation and estate, uses, limitations and estates hereinbefore limited, expressed, declared and contained of and concerning the said hereditaments and premises whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or to the receipt of the rents and profits of the family estates of the said Sir James Langham, or any of them, to the amount of 1,000*l.* per annum as aforesaid, and to or for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine and be absolutely null and void, and then and in every such case, all and singular the said hereditaments and premises shall, immediately thereupon, from time to time, divest out of the person or persons so becoming entitled, and shall go over in such and the same manner, to all intents and purposes, as if such person or persons *so becoming entitled were actually dead without issue male." [*262]

Francis Tutte made his will, bearing date the 24th of June, 1820, and thereby, in pursuance of the power reserved to him by the indenture of the 12th of April, 1804, and of all other powers, &c., appointed all the said manors and other hereditaments to the use that Louisa Wainwright should receive, during her life, an annuity of 100*l.*, and, subject thereto, to the use of Alexander Hale Strong, since deceased, and the plaintiffs, their heirs and assigns, upon certain trusts for raising the sum of

12,000*l.*, to be considered as part of the testator's personal estate, and, subject thereto, he hereby directed and appointed that Strong and the plaintiffs and the survivor of them, and the heirs and assigns of such survivor, should stand seised of (and he did thereby limit and appoint the same accordingly) all the said manors and other hereditaments, to the use of James Hay Langham the eldest son of Sir James Langham, of Cottesbrook Hall in the county of Northampton, bart., (Sir James Langham being the same person as in the indenture was mentioned as James Langham, Esq.) and his assigns for his life, with remainder to the use of John Lupton and Willoughby Rackham, and their heirs, during the life of James Hay Langham, upon trust to preserve the contingent uses and estates thereinafter limited, with remainder to the use of the first and other sons of James Hay Langham, successively, in tail male, with remainder to the use of the right heirs of Herbert Hay, Esq., deceased, for ever: and in the will were contained provisoes in the following words: "Provided always and it is my will and meaning that each person who, by virtue of any of the uses, limitations or provisions herein contained, shall, for the [*263] *time being, be tenant for life in possession of the said manors, hereditaments and premises, or of any part thereof, and shall, at the same time, become entitled to the settled estates of Sir James Langham of Cottesbrook Hall, in the said county of Northampton, bart., so as to be in the actual receipt of the rents thereof, then and in every such case and thenceforth, the estates and interests hereinbefore limited to every tenant for life respectively, of and in the said manors, hereditaments and premises hereby limited, as shall become so entitled in possession to said settled estates of the said Sir James Langham, shall cease and determine: provided also and it is my will and meaning that every person who, according to the uses, limitations or provisions herein contained, shall, for the time being, be tenant in tail in possession of the said manors, hereditaments and premises hereinbefore limited, and shall, at the same time, become entitled to the said settled estates of the said Sir James Langham, so as to be in the actual possession or in the actual receipt of the rents and profits thereof, then and in every such case

and thenceforth the estate tail which every such person shall, by virtue of any of the trusts, limitations or provisions, be seised of or entitled to, of or in the said manors, hereditaments and premises hereby limited, shall cease and determine; and in either of the cases last before mentioned, the said manors, messuages, lands, tenements, hereditaments and premises hereby directed, limited and appointed as aforesaid, shall, immediately thereupon, go over to the person next in remainder under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same by virtue of this my will, if the person so becoming entitled to the said settled estates of the said Sir James Langham, being tenant for life, was dead, or, being tenant in tail, was dead without issue male." The testator *then devised his copyhold and customary estates [*264] to Strong, his heirs and assigns, upon such trusts, and with, under and subject to such powers, provisoes and limitations, and to and for such intents and purposes as would nearest and best correspond with the uses and trusts thereinbefore limited, of and concerning his manors and freehold hereditaments thereinbefore directed, appointed and limited. And, as to all the rest and residue of his real and personal estates of every nature and kind whatsoever, he gave and bequeathed the same to Strong and the plaintiffs, and their and each of their heirs, executors, administrators or assigns, in equal third parts, according to the nature and quality of the same estates respectively, in manner following: that is to say, as to one equal third part, unto Alexander Hale Strong, his heirs, executors, administrators or assigns for ever; as to one other equal third part thereof, unto the plaintiff, F. E. Morrice, his heirs, executors, administrators and assigns for ever; and, as to the remaining third part thereof, unto Alexander Hale Strong and the plaintiffs, and to the survivors and survivor of them, his heir, executors, administrators or assigns, upon certain trusts therein mentioned.

The testator died without issue on the 13th of January, 1824; and, upon his decease, Sir James Hay Langham, the first tenant for life named in the will, entered into and had ever since continued in the possession or receipt of the rents and profits of the

freehold and copyhold hereditaments appointedand devised as hereinbefore mentioned.

On the 14th of April, 1833, Sir James Langham, in the indenture called James Langham, Esq., died, leaving Sir James Hay Langham, his eldest son him surviving, *who, thereupon, became entitled to his father's settled estates, mentioned in the will, of the clear annual value of several thousand pounds; and he, accordingly, entered into the actual possession or receipt of the rents of those estates: and the bill, after stating as above, alleged that, thereupon, the estate and interest limited, by the will, to Sir James Hay Langham, of and in the freehold and copyhold estates comprised in and respectively appointed and devised by the will, did, altogether, cease and determine under and by virtue of the proviso in the will in that behalf contained. The bill further alleged that, at the time when Sir James Hay Langham became entitled to the said settled estates, he had not, nor had he at any time had any issue: and that the plaintiffs were advised that, upon Sir James Hay Langham becoming so entitled as aforesaid, they themselves, together with Strong or his representatives, became entitled, under the residuary devise in the will, as tenants in common in equal undivided third parts, according to their respective interests, to the freehold and copyhold estates so respectively appointed and devised as aforesaid by Francis Tutte, for an estate or interest during the life of Sir James Hay Langham, or until he should have a son, the plaintiffs being advised that the residuary devise in Francis Tutte's will, included and passed such interest in the real estates comprised in the indenture of the 12th of April, 1804, and appointed by the testator as aforesaid, and also in the copyhold estates devised by his will, as was not otherwise disposed of by the appointment and devise contained in the will; more especially as the testator, at the time of making his will, had no freehold estate except the estates comprised in the indenture of the 12th of April, 1804; that Strong died on the 2nd of May, 1824, having appointed three persons, of whom George Law was *the survivor, his executors: that, in December, 1824, the plaintiffs made a mortgage in fee of the testator's

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freehold estates, for the purpose of raising the 12,000*l.*, and that sum still remained due on the mortgage: that, under the circumstances aforesaid, the plaintiffs were unable to recover possession of the estates, at law; but they, being entitled, together with George Law, to such interest in those estates as before mentioned, had requested Sir James Hay Langham to account for the rents of the freehold and copyhold estates received by him since the death of his father, and to let the plaintiffs into possession of two undivided third parts of the same; but Sir James Hay Langham had refused so to do, pretending that, notwithstanding the circumstances before mentioned, he was entitled to a present interest in the estates by virtue of the will or some other legal instrument; but the plaintiffs charged the contrary, and that the estate for life limited to Sir James Hay Langham by the will, had ceased and determined as before mentioned: that Langham Christie pretended that he was, under the circusmtances before mentioned, entitled to the aforesaid interest in the freehold estates and the rents and profits thereof; but the plaintiffs charged the contrary: that Edward Ayshford Sanford claimed to be the heir at law of Herbert Hay, and to be entitled, as such, to the freehold and copyhold estates during the life of Sir James Hay Langham; but which claim was wholly unfounded: that Herbert Langham, who was the second son of Sir James Langham, mentioned in the indenture as James Langham, Esq., also claimed to be entitled to the freehold estates during the life of Sir James Hay Langham, under the indenture of the 12th of April, 1804; although, as the plaintiffs charged, all the limitations, in that indenture contained, *to or in favor of the issue male of Sir James Langham, had been defeated by the [*267] effect of the proviso before set forth; inasmuch as Sir James became entitled, in his lifetime, to the family estates mentioned in that proviso: that John Lupton insisted that, under the limitations contained in the will, the first estate thereby limited after the estate for life to Sir James Hay Langham, of and in the freehold estates, was then vested in him as having survived his co-trustee, Rackham.

The bill prayed that it might be declared that, upon Sir James

Hay Langham becoming entitled to the settled estates upon the decease of his father Sir James Langham, the plaintiffs, together with Strong's representatives, became entitled, under the residuary devise or appointment in the testator's will, to the rents of the freehold and copyhold estates, thereby appointed and devised, during Sir James Langham's life, or until he should have a son; and that he might be decreed to deliver up the possession of those estates to the plaintiffs, and to George Law, and that an account might be taken of the rents and profits thereof, come to the hands of Sir James Hay Langham since his father's death, and for a receiver.

Mr. *Wigram,* and Mr. *Sidebottom*, for the plaintiffs, said that the testator, when he mentioned, in his will, the estates which were subject to the power, spoke of them as his estates; therefore, when he used, in the residuary clause, the expression, all his real estates, he must have meant to include his estates subject to the power, of which he was virtually the owner, as well as his copyhold estates; and, moreover, that the testator, throughout his will, had manifested an intention that his estates
[*268] subject to the power, and his copyhold *estates, should go and be enjoyed together: and, consequently, the rents, accrued in respect of the former as well as the latter estates, since Sir James Hay Langham had become entitled, in possession, to the settled or family estates at Cottesbrook, not being expressly disposed of by the will, passed, by the residuary clause, to the plaintiffs, and to George Law, as representing Strong: that Herbert Langham could have no right to the rents in question, as he claimed under the deed, and, by the shifting clause in it, Sir James Langham, when he became entitled to the Cottesbrook estates, forfeited the testator's estates, not only for himself, but for his issue-male: that the heir of Herbert Hay was not entitled to the rents, as he was not to take any interest, in the testator's estates, until Sir James Hay Langham should die without issue-male. *Stanley* v. *Stanley*,(*a*) *Churchill* v. *Dibben*,(*b*)

(*a*) 16 Ves. 491.

(*b*) Lord Kenyon's Cases, Vol. II. part 2, p. 68; and ante, Vol. IX. p. 447, note.

Dillon v. *Dillon*,(a) *Standen* v. *Standen*,(b) *Walker* v. *Mackie*,(c) *Hughes* v. *Turner*,(d) *Margaret Podger's Case*.(e)

Mr. *Law* appeared for the defendant, George Law, who was in the same interest as the plaintiffs.

Mr. *Lutwyche*, for Sir James Hay Langham, said that he submitted his interest to the judgment of the Court.

Mr. *Jacob* and Mr. *James Parker* for Langham Christie:—Mr. L. Christie claims, under the deed, every thing that was not well appointed by the testator; and, therefore, he claims the rents accrued, and to accrue in respect *of the estates [*269] subject to the power, from the death of Sir James Langham, until Sir James Hay Langham dies, or has a son, those rents being clearly undisposed of by the will.

The testator has divided his will into two distinct parts; one is the appointing part, and the other the devising part. The appointing part ends with the provisoes: then follows the devising part, in which the residuary clause occurs. In the former part, he constantly uses the words, "direct and appoint;" but he never uses the words in the latter part. When a testator speaks of his estates, he always means the estates in which he has a devisable interest; and it is plain, throughout the will, that the testator understood the distinction between power and ownership. The rents in question, then, being unappointed, we look back to the deed in order to ascertain who is entitled in default of appointment, and there we find that Langham Christie is that person; and, consequently, he is entitled to the rents. *Hopkins* v. *Hopkins*.(g) *Carr* v. *Lord Erroll*,(h) *Doe* v. *Heneage*.(i) *Lewis* v. *Lewellyn*,(k) *Napier* v. *Napier*.(l)

(a) 1 Ball. & Beatt. 77.
(b) 2 Ves. jun. 589.
(c) 4 Russ. 76.
(d) 3 Myl. & Keen, 666.
(e) 9 Co. Rep. 104.
(g) 1 Atk. 581; and Butler's Notes to Co. Litt. 271 b. Hargrave on the Thellusson Act, p. 48.
(h) 6 East, 58.
(i) 4 T. R. 13.
(k) Turn. & Russ. 104.
(l) Ante, Vol. I. p. 28.

Mr. *Hodgson* and Mr. *James Russell*, for the defendant Sanford, the right heir of Herbert Hay, contended that their client was entitled to the rents in question, as being, in the language of the shifting clause, "the person next in remainder:" that is, the next vested remainder-man, under the limitations of the will: that those limitations, were all of them limitations of equit-
[*270] able *estates: that although Sir James Hay Langham's interest in the estates subject to the power, had ceased, yet, according to Lord Kenyon's judgment in *Doe* v. *Heneage*, the interest of Lupton and Rackham, the trustees to preserve contingent remainders, remained undivested; and, in the events that had happened, they were trustees for the defendant Sanford, as the only person having a vested remainder in the estates; and that, when any one of the prior contingent remainders took effect, then the same trustees, would be trustees for the person in whom that remainder should vest. *Carr* v. *Lord Erroll* and *Stanley* v. *Stanley*.

Mr. *Knight Bruce*, and Mr. *Romilly*, for Herbert Langham, the second son of Sir James Langham, and the eldest brother of Sir James Hay Langham, said that their client claimed the rents in question, as being undisposed of, and that his claim, like Mr. Langham Christie's, was under the deed of April, 1804: that Mr. *Hodgson* had commented on *Doe* v. *Heneage*, *Carr* v. *Lord Erroll*, and *Stanley* v. *Stanley*; but had not noticed *Hopkins* v. *Hopkins*, the slightest reference to which would show that any claim on the part of the heirs of Herbert Hay, was quite out of the question: that there was no limitation in the deed, to the issue of Sir James Langham, *eo nomine*; but his sons were to take as purchasers: that the legitimate construction of the proviso in the deed, was, that it caused a cesser of the estate of that individual only, who succeeded to the Cottesbrook estate; and, that it did not import that, if the estate of one individual ceased on his becoming entitled to the Cottesbrook property, the estate of another individual also should cease: that the words "issue-male" had no bearing on the cesser of a tenancy for life, but applied to the cesser of a tenancy in tail:

that *Sir James Hay Langham, having become entitled [*271] to the Cottesbrook estate, the case was the same as if his life-estate had been struck out: that the question was, in fact, a legal one, and, therefore, it ought to be submitted to a court of law.

The following cases were referred to by Mr. *Romilly*, as showing that the rents were undisposed of: *Bennett* v. *Aburrow*,(*a*) *Loxes* v. *Hackward*,(*b*) and *Doe* v. *Bird*.(*c*)

Mr. *Cockerell* for the defendant Lupton.

Mr. *Bacon*, for William Youatt and Mary his wife, who had been brought before the Court by supplemental bill, said that Mrs. Youatt was the testator's heir, and claimed what, if anything, was undisposed of.

Mr. *Wigram*, in reply, said that neither the heir of Herbert Hay, nor the heir of the testator, was entitled to the rents in question: *Carrick* v. *Errington*,(*d*) where Lord King, C., said that, if an estate once went to a remote remainder-man, it could not, afterwards, go back to any person claiming under a prior limitation: that the plaintiffs and the defendant, Law, were unquestionably entitled to the undisposed of rents of the copyhold estates, and that they were also entitled to the undisposed of rents of the estates subject to the power: as the testator, throughout his will, had called those estates his estates.

16*th November*.—THE VICE-CHANCELLOR:—In this case there are four questions raised. The first is that which Mr. *Wigram* has argued for the plaintiffs, *and which will [*272] depend, entirely, upon the construction of Mr. Tutte's will, as contrasted with the nature of the estate which, Mr. *Wigram* has contended, was the subject of devise: I mean with respect to the limitations that had been made of it by the deed of April, 1804.

(*a*) 8 Ves. 609.
(*b*) 18 Ves. 168.
(*c*) 11 East, 49.
(*d*) 2 P. W. 361.

Supposing that the claim of the plaintiffs is out of the way, then there are the three questions that have been raised on behalf of the right heir of Herbert Hay: on behalf of Mr. Langham Christie, and on behalf of Mr. Herbert Langham: and, as to some of those questions, it seems to me that there is no doubt at all.

With respect, first of all, to the claim of the plaintiffs. The estate in question was, by deed and fine and recovery, settled to such uses as Mr. Tutte should appoint, generally, and, in default of appointment, to him in tail, and then with remainders over; but, as I understand it, there was no remainder in fee to him. Then, that being so, Mr. Tutte makes his will in the year 1820; and he makes it in this form: First, he desires that all his just debts, funeral and testamentary expenses, may be paid and satisfied: secondly, in pursuance of the power and authority reserved to him by the indenture (which he describes,) he directs, limits and appoints all that the manor, &c., (describing the parcels at considerable length) to the use and intent that Louisa Wainright may receive an annuity, with remainder to the use of three gentlemen, their heirs and assigns, on the trusts following, that is, in trust to raise a sum of 12,000*l.* in a given manner, and subject thereto, to the use of James Hay Langham for his life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male, with remainder to the right heirs of Herbert Hay. Then there are certain provisoes upon
[*273] *which I shall comment presently; and, after the provisoes, there comes this devise: "I give and devise all and every my copyhold and customary messuages, cottages and hereditaments, with their and every of their rights, members and appurtenances, unto the said Alexander Hale Strong, his heirs and assigns, according to the custom of the several manors whereof such copyhold or customary hereditaments are holden, nevertheless upon such trusts, and with, under and subject to such powers, provisoes and limitations, and to and for such intents and purposes as will nearest and best correspond with the uses and trusts hereinbefore limited of and concerning my said manors and freehold hereditaments hereinbefore directed, appointed and

limited." Then he disposes of his books: and then there comes the residuary clause: "And as to all the rest and residue of my goods and chattels, and real and personal estates, of every nature and kind soever, including, in the latter, the aforesaid sum of 12,000*l.* or such part thereof as I shall not give and bequeath by some codicil or codicils to this my will, or some paper writing purporting to be a codicil, I give and bequeath the same" unto the said three gentlemen; and then he divides it between them in three parts.

It has been said that, inasmuch as, in the events that have happened, a certain portion of interest in the estates which were the subject of the appointment, has not gone according to the appointment, it has passed by the residuary devise; and it has been said that the expression: "the rest and residue of my goods and chattels and real and personal estates," includes that interest. With respect to the copyholds, the fee simple of which was devised to trustees upon such trusts as would most nearly correspond with the limitations of the *freehold estates, [*274] those copyholds being the testator's estate in the ordinary sense of the words, it is perfectly plain, I think, that, so far as the trusts which were declared of them by the will did not eventually exhaust the whole beneficial interest, the surplus of the beneficial interest would pass by the residuary devise.

But then it is said that the surplus of the freehold estates also has passed by the residuary devise. Now I must confess that, after reading the will and attending to the argument, it is quite clear to me that it did not: because the case of *Standen* v. *Standen*, and cases of that kind, appear to me to have nothing to do with the matter. The question is whether, on the face of the will, it appears that there was an intention, in the testator, to pass, by devise, every portion of the estate which was subject to his appointment. In my opinion it is quite impossible for any body to look at this will, without seeing that the testator has divided it into two parts, and that the second part is made, wholly and exclusively, to be applicable to the subject of the freehold estates over which he had the power. He begins the clause by saying: "And secondly, in pursuance of the power;" and he

confines himself entirely to the execution of the power; and then he finally ceases to notice the estate which was subject to the power. When he comes to that clause in which he directs the trusts to which the copyholds are to be subject, and in which he refers to, "my said manors and freehold hereditaments hereinbefore directed, appointed and limited," it is quite plain that he had completely exhausted his power, and appointed the whole fee simple.

But then it is said that he has referred to the estates over which he had the power, by the term, "my" in the re-
[*275] siduary clause; because, in the course of declaring *the trusts concerning the fee of the freehold hereditaments which where appointed to the trustees, he has used the expression "my manors, farms and lands called Goate." The answer to that is that, there, he is only describing the particular order in which the sum of 12,000*l.* shall be raised; first of all, a certain portion of the estate is to be applied, and then another portion, and then, in speaking of the parts, he speaks of them, simply, as "my manors, farms and lands called Goate and my farm called Glynd," &c. But it is quite plain that, by the expression, "my," he did not mean to appropriate to himself in fee simple those estates the fee simple whereof he had before exhausted by the appointment which he had made. In my opinion, therefore, the true construction of the will is that, though the rents of the copyholds pass, because they were the testator's, strictly speaking, the interest in the freeholds which eventually become unappointed, did not pass by the residuary devise.

If, then, the claim of the plaintiffs is out of the question, I must consider the three next claims, which are opposed to each other. The claim which has been made on the part of the heir of Herbert Hay, is a claim which I can dispose of, because it is merely an equitable claim; for the effect of the appointment was to vest the whole legal estate in the trustees; and, therefore, any interest which the heir of Herbert Hay can claim, is purely equitable. But then how does that stand? In some respects, it stands in common with the claims of the other claimants; but I have always understood the rule to be that, whether you speak of the

residue of a fee-simple estate which is vested in a testator and which is not wholly devised, or, whether you speak of an estate *which is subject to limitations liable to be de- [*276] feated by the exercise of a general power of appointment, if, in the one case, the testator does not devise the whole, what is not devised remains in him, and, in the other case, where the estate is subject to a set of limitations, only preceded by a general power of appointment, whatever is not exhausted by the exercise of the power, remains subject to the limitations.

Then let us see how the matter actually stood at the time of the testator's death. By the deed of 1804, the limitations were (putting now the testator out of consideration) to Sir James Langham for life, with remainder to his first and other sons in tail male, with remainder to Langham Christie for life, and then with remainders over. Sir James Langham entered into possession of the Cottesbrook estate in the year 1812: and the claimants make no dispute about this, namely, that his estate would then have ceased. The testator died in 1820; and Sir James Langham died in 1833. Then James Hay, his son, was the person on whom the Cottesbrook estate devolved. Now, if the appointment had not been made, James Hay Langham would have been tenant in tail male of the testator's estates under the limitations in the deed of 1804; but, under the will of 1820, and by virtue of the appointment, he was made tenant for life; and the proviso in the will declared that if any person who, under the limitations of the will, should be tenant for life in possession of the manors and hereditaments, or of any part thereof, which were appointed by the will, should, at the same time, become entitled to the settled estates of Sir James Langham, so as to be in the actual receipt of the rents thereof, then and in such case the estates and interests thereinbefore limited to every such tenant *for life, should cease and determine. That is a proviso [*277] respecting the tenant for life. Then the testator speaks of the case of the tenant in tail, and adds: "In either of the cases last before mentioned, the said manors, messuages, lands, tenements, hereditaments and premises hereby directed, limited and appointed as aforesaid, shall, immediately thereupon, go

over to the person next in remainder under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same by virtue of this my will if the person so becoming entitled to the said settled estates of the said Sir James Langham, being tenant for life, was dead, or, being tenant in tail, was dead without issue male." There seems to be no doubt whatever that, immediately upon James Hay Langham coming into possession of the settled estates, his interest in the estates under the will, ceased; and that, in fact, has raised the question. But then it is to be observed that, in the deed of 1804, the clause was: "that in case the said James Langham or any issue male of his body, shall become entitled to the possession or to the receipt of the rents and profits of the family estates late of the said Sir James Langham, deceased, to the amount of 1,000*l.* per annum over and above all outgoings and reprizes, then and in every such case, the use, limitation and estate, uses, limitations and estates hereinbefore expressed, declared and contained of and concerning the said hereditaments and premises whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or to the receipt of the rents and profits of the family estates late of the said Sir James Langham or any of them, to the amount of 1,000*l.* per annum as aforesaid, and to or for the benefit of the issue male of
[*278] such person or persons so *becoming entitled, shall cease, determine and be absolutely null and void; and, then and in every such case, all and singular the said hereditaments and premises shall, immediately thereupon, from time to time, divest out of the person or persons so becoming entitled, and shall go over in such and the like manner, to all intents and purposes, as if such person or persons so becoming entitled, were actually dead without issue male." On the part of the heir of Herbert Hay, under the will, it is insisted that he is entitled: but then the argument for him is this, that the effect of the shifting clause is to destroy the life estate of Sir James Hay Langham, to preserve the estate of the trustees to preserve contingent remainders, and, nevertheless, to give to the person who would

take in remainder provided there was no issue of Sir James Hay Langham, those rents and profits which, on the face of the trust to preserve contingent remainders, were to be for the benefit of Sir James Hay Langham: which appears to me to have the effect of making the heir of Herbert Hay take, immediately, as the next person in remainder, notwithstanding the estate in the trustees to preserve contingent remainders for the benefit of the first and other sons of Sir James Hay Langham; which I take to be contrary to law, and moreover to involve this sort of contradiction; namely, that though the trustees were to take the rents and profits for the benefit of Sir James Hay Langham and his estate and interest is to cease, yet they are to hold them for the benefit of persons for whom they are in no sense trustees, any otherwise than as they might be trustees, in the first instance, to preserve the estate limited contingently to the first and other sons of Sir James Hay Langham, and so, if it were necessary, preserve the estate to the right heirs of Herbert Hay, but in no other manner whatever.

*It appears to me that it is quite impossible to argue [*279] the case on behalf of the heir of Herbert Hay, without running into a manifest inconsistency, and without, in effect, contradicting the principle of *Hopkins* v. *Hopkins*, and other cases of that kind, which are unquestionable. It appears to me that the real effect of *Stanley* v. *Stanley*, *Doe* v. *Heneage* and *Carr* v. *Lord Erroll*, is this, that the courts are bound to construe the words of cesser, as near as they possibly can, in their simple and ordinary sense; and my opinion is that there is no mode whatever of construing the words of cesser in the will of Mr. Tutte, which can have the effect of giving any interest to the right heirs of Herbert Hay.

The question then is this, whether, under the limitations in the deed of 1804, the person who is entitled to take, is Mr. Herbert Langham or Mr. Langham Christie. Now, with respect to that, I think that the point is reasonably clear; and, if the parties wish it, I will state my opinion, leaving them then to take the opinion of a court of law; or, if the parties prefer it I will not give my opinion and send the question to a court of law.

Mr. *Knight Bruce* said he wished that a case should be sent to a court of law, unprejudiced by his Honor's opinion.

Mr. *Jacob* said that it was not the course of the Court to send a case to law, unless it wanted the assistance of a court of law to enable it to decide on the point in dispute and the question arose upon the limitation of a legal estate; neither of which circumstances existed in this case; for his Honor thought the point was reasonably clear, and all the limitations in the will, [*280] were *limitations of equitable estates, the legal fee having been vested in the plaintiffs and A. H. Strong, at the commencement of the will.

THE VICE-CHANCELLOR:—It is perfectly true that the question relates to an equitable interest; but nevertheless the right depends upon the true construction of the shifting clause in the deed of 1804; and, though I have very little doubt as to the construction of it, still if Mr. *Knight Bruce* presses for a case to be sent to law, I do not see how I can refuse it.

The decree was drawn up in the following words: Declare the will of the Rev. Francis Tutte, the testator in the pleadings named, well proved, and that the same ought to be established and the trusts thereof performed. Declare that, according to the true construction of the testator's will, the rents and profits of the testator's copyhold estates, as from the 14th day of April, 1833, the time when the defendant Sir James Hay Langham became entitled to the settled estates of Sir James Langham of Cottesbrook Hall, so as to be in the actual receipt of the rents thereof, to the time of the decease of the said Sir James Hay Langham or until he should have male-issue, passed, by the residuary devise in the will, to Alexander Hale Strong deceased, and the plaintiffs, Frederick Edward Morrice and Arnold Wainwright, in equal third parts, in manner and according to the directions and trusts of the will. And declare that the rents and profits, of the freehold estates in question in these suits, accrued and to accrue during the same period or any part thereof, were

not disposed of by the said will, and that the same belong to the person or persons who would have been entitled to such estates, *under the indenture of the 12th day of April, [*281] 1804, in the pleadings mentioned, in default of any appointment, by the testator Francis Tutte, in exercise of the power therein contained. Order that a case be made for the opinions of the Barons of the Court of Exchequer, and that the questions in such case be: whether, under the limitations contained in the said indenture of the 12th day of April, 1804, and the proviso therein, supposing the appointment to have been made by the said Francis Tutte in exercise of the power therein contained, the defendant, Herbert Langham, is now entitled to any and what estate in the freehold hereditaments comprised in the said indenture, and whether the said defendant, Langham Christie, is now entitled to any and what estate in the said freehold hereditaments, &c.(a)

Note.—The case directed, by the decree in this cause, to be made for the opinion of the Barons of the Exchequer, was argued in April, 1841.

The Barons certified that, under the limitations in the indenture of the 12th of April, 1804, Herbert Langham, upon the death of Francis Tutte, did not become entitled to any estate in the hereditaments therein comprised, and that Langham Christie, on the death of Francis Tutte, became entitled to an estate for life in the said hereditaments. (See 8 Mess. & Wels. 194.)

(a) An appeal is pending in the House of Lords against this decree.

1840.—Piper v. Gittens.

[*282] *PIPER *v.* GITTENS.

1840: 18th November.

On the 25th of July the defendant served a notice of motion to dismiss, to be made on the 29th, the next seal. On the 27th, plaintiff replied, and tendered 20*s.* costs to defendant, which the defendant refused to accept until he had ascertained whether he ought to do so or not, and the whole of the 28th was allowed him for that purpose. At eight o'clock in the evening of the 28th, plaintiff instructed counsel to appear on the motion. At ten in the morning of the 29th, defendant said he would accept the costs. The Court held that he was loo late, and ordered him to pay the costs of the motion, *minus* 20*s.*

ON the 25th of July, the defendant served the plaintiff with notice of a motion, to be made on the 29th, which was the then next seal-day, to dismiss the bill for want of prosecution. On the 27th, the plaintiff filed a replication; and, on the morning of the 28th, tendered, to the defendant's solicitor, 20*s.* costs. The solicitor declined to accept the costs, until he had ascertained whether he ought to accept them or not; and the whole of the 28th was allowed him for that purpose. Between eight and nine o'clock in the evening of that day, the plaintiff's solicitor, not having received any further communication from the defendant's solicitor, delivered a brief to counsel to appear upon the motion. At ten o'clock in the morning of the 29th, the defendant's solicitor said he would accept the costs; but was then told that he was too late, as the plaintiff's brief had been delivered to counsel on the preceding evening.

Mr. *Lowndes*, for the motion, said that the defendant's solicitor was allowed the whole of the 28th to consider whether he would accept the costs or not; and, therefore, the plaintiff's solicitor, was too precipitate in delivering his brief to counsel on that day.

Mr. *Knight Bruce*, for the plaintiff, said that the whole day, meant only the business hours, and that the next day was the seal-day.

1840.—Brown v. Douglas.

THE VICE-CHANCELLOR said that if the defendant's solicitor was to have the whole day to consider whether he would accept the costs or not, he ought to have given his decision on that day, between eight and nine o'clock at the latest: and he ordered the defendant to pay the costs of the motion, *minus* 20*s*.

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*BROWN *v.* DOUGLAS. [*283]

1840: 23d and 25th November.

A. B. C. and D. where co-partners. A. and B. died, and, soon afterwards, C. and D. became bankrupt. M., who was a creditor of the firm at the deaths of A. and B. and at the bankruptcy, filed a bill, on behalf of himself and all the other creditors of A. and B., against the executors (who, however, had not proved) and devisees of both A. and B. and the assignees of the bankrupts, for the purpose of having the real and personal assets of both A. and B. applied in payment of their joint and separate debts. Held that the administration of the two estates might be comprised in one suit, and, therefore, a demurrer for multifariousness, was over-ruled. An objection, however, made *ore tenus*, that no properly constituted personal representatives of A. and B. were parties, was allowed: but the Court did not give the plaintiff the costs of the demurrer on the record, but merely allowed the demurrer *ore tenus*, without costs.

IN 1839, Douglas, Sedgwick, Weatherby and four other persons, carried on the business of cotton-spiners, in co-partnership, at Holywell in Flintshire, under the firm of Douglas, Smalley & Co.; and Douglas & Weatherby, carried on the same business, in co-partnership, at Pendleton in Lancashire, under the firm of W. Douglas & Co. Sedgwick died on the 3rd, and Douglas on the 21st of October, in that year. In April following, the surviving partners became bankrupt. At the deaths of Sedgwick and Douglas, and at the time of the bankruptcy, a debt was due, from each of the two firms, to the Manchester Joint Stock Banking Company. The Company proved, under the fiat, the debt due from Douglas, Smalley & Co.; but had received no dividend on that proof; and they had not proved, against Weatherby's separate estate, the debt due from W. Douglas & Co.

The bill was filed by the banking company in the name of

one of their public officers, against the executors of Douglas, and of Sedgwick, the widow, and son of the former, who were interested in his real estates, under his will, the assignees of the bankrupts, and two other persons with whom Douglas's
[*284] son, after *his father's death, and before the issuing of the fiat, had deposited the title deeds of his father's real estates, as a security for a debt alleged to be due to those two persons from Douglas, Smalley & Co.: and after stating as above, it alleged that the estate of the bankrupts distributable under the fiat, would not be sufficient to pay the full amount of their debts; but, after all such joint estate should have been distributable under the fiat, and after Weatherby's separate estate should have been administered, a considerable part of the debts of the bankrupts, and their late partners, would be left unpaid: that Sedgwick had made a will, and appointed J. Stanton executor thereof: that it had not been proved in the Ecclesiastical Court; but Stanton, as the executor named therein, had possessed himself of the testator's personal estate to a considerable amount, and ought to apply the same in payment of the testator's funeral expenses, and debts, in a due course of administration: that Douglas had made a will, and thereby devised his real estates to his son, charged with an annuity to his widow, and appointed his widow, and son, and Weatherby, his executors: that they, or any of them had not proved the last mentioned will, in the proper, or any Ecclesiastical Court; but had taken upon themselves the execution thereof, and possessed themselves of their testator's personal estate, sufficient to pay his funeral, and testamentary expenses, and debts, or a considerable part thereof; and, without proving the will, were proceeding to convert such personal estate into money: that Douglas's son, as his heir, or as his devisee, had entered into possession of his real estates: that Douglass, at his death, was a trader within the meaning of the bankrupt law, and therefore, all his real estate was subject, in equity, to the payment of his simple contract debts. The bill prayed that it might be
[*285] declared that the estates of Sedgwick *and Douglas, respectively, were liable, in equity, to the payment of so

much of their late partnership debts, as were due at their respective deaths, and still remained unpaid: that an account might be taken of what was due from them, respectively, and their partners, to the banking company, and to their other joint and separate creditors, and also of their personal estates possessed by their respective executors, and of Douglas's real estates, and the rents thereof received by his son; and, if his personal estates should be insufficient to pay his debts, that his real estates might be sold, and the proceeds applied to make up the deficiency; that the title deeds thereof, might be delivered up, and deposited in the Master's office, for safe custody; that it might be ascertained whether the holders of the deeds had any, and what lien thereon, or on Douglas's real estates, and that the priority and extent of such lien, might be ascertained and declared: that it might be also declared that any charge or incumbrance on the said estates, made by Douglas's son, since his father's death, was subject to the payment of his father's debts, and the rights of his creditors in respect thereof: that his executors might be restrained from further intermeddling with his personal estate, and especially from selling his pictures, library, plate, &c.: that a receiver might be appointed of his real estates, and of his, and Sedgwick's personal estates, and that their personal estates, and Douglas's real estates, so far as might be necessary, might be applied in payment of their respective funeral, and testamentary expenses, and of their debts, as well joint as separate, in a due course of administration.

Douglas's widow and son demurred, for want of equity and for multifariousness.

*Mr. *Jacob* and Mr. *James Russell*, in support of the [*286] demurrer:—The plaintiff is affecting to sue on behalf of all the creditors of Douglas, and also of the creditors of Sedgwick. The estates of the two debtors are separate; but it happens that one creditor, Brown, has a claim against both of them. There may be, however, and there are, no doubt, other creditors who have claims against only one of the estates. The accounts of one estate, and the claims upon it, may be simple,

and few in number; but the accounts of the other, and the claims upon it, may be very complicated and numerous: and, if both the estates were to be administered in one suit, the claimants on the one would have to wait for the satisfaction of their demands, until the intricate accounts of the other estate were taken, and the numerous and complicated claims upon it, were ascertained. *Turner* v. *Robinson*,(a) *Marcos* v. *Pebrer*.(b)

Secondly: there is no equity against the demurring defendants. They have not proved their testator's will, and supposing them to be executors *de son tort*, which they are not, still they cannot be sued by a creditor. They are debtors to the estate, and may be sued by the personal representative, when there is one properly constituted; but they cannot be sued by a creditor, and certainly not in a suit to which no personal representative of the deceased debtor is a party. *Simons* v. *Milman*.(c)

Mr. *Knight Bruce*, and Mr. *Teed*, for the plaintiff, contended that the bill was rightly constructed according to the
[*287] principles of the Court, as they were to be *deduced from *Wilkinson* v. *Henderson*,(d) *Stephenson* v. *Chiswell*,(e) *Gray* v. *Chiswell*,(g) *Winter* v. *Innes*,(h) and *Campbell* v. *Mackay*.(i) Secondly, that the objection, that no personal representative of either of the deceased partners was before the Court, was an objection for want of parties, not for want of equity; and, if the demurrer was allowed on that ground, it must be allowed without costs, as being a demurrer *ore tenus*. *Mortimer* v. *Fraser*.(k)

25*th November*.—THE VICE-CHANCELLOR:—In this case, it appears that Sedgwick, Douglas, Weatherby and four other persons, carried on a partnership together; and Douglas and Weatherby carried on a separate partnership by themselves; and

(a) 1 Sim. & Stu. 313.
(b) Ante, Vol. III. p. 466.
(c) Ante, Vol. II. p. 241.
(d) 1 Myl. & Keen, 582.
(e) 3 Ves. 566.
(g) 9 Ves. 118.
(h) 4 Myl. & Cr. 101; see 109.
(i) Ante, Vol. VII. p. 564; and 1 Myl. & Cr. 603.
(k) 2 Myl. & Cr. 173.

the partnership of the seven and the partnership of the two, became indebted to that company which the plaintiff, Brown, represents. Then Sedgwick died; and Douglas died very shortly afterwards. After their deaths, a fiat in bankruptcy issued against the remainig five partners of the first-mentioned partnership, comprehending, therefore, Weatherby, who was the partner with Douglas in the partnership of the two. In this state of circumstances, the bill has been filed by a gentleman who represents a banking company, to which the partnerships were indebted at the deaths of Sedgwick and Douglas, seeking relief against the personal estate of Sedgwick and against the real and personal assets of Douglas; and, to that bill, the assignees of the bankrupts are made parties. A demurrer has been filed by two of the parties interested in the real *estate of [*288] Douglas, and who are also named as his executors; and the demurrer assigns, for the reasons, upon the record, want of equity and multifariousness: and there was also a reason assigned, *ore tenus*, at the bar, namely, that there was a defect of parties.

The principal objection that was made to the bill, was that it was multifarious: but, in my opinion, that objection cannot be sustained. I have fully considered the subject since the case was argued; and it appears to me to have been completely settled, by the case of *Gray* v. *Chiswell*, that, where a partnership becomes indebted, the rule is that the joint estate must first be applied in payment of the joint debts, and then that the surplus of the separate estate of each partner, which may remain after payment of the separate debts of that partner, is contributable to supply the deficiency of the joint estate to pay the joint debts. In principle, the very point which is made by this demurrer, was decided, by Sir John Leach, in the case of *Wilkinson* v. *Henderson*. There Shepherd & Hartley had been partners together, and were indebted. Shepherd died; and the bill was filed by a joint creditor, on behalf of himself and all the other joint creditors of Shepherd & Hartley, against Hartley, the surviving partner, and the representative of Shepherd, for the purpose of having the partnership debts paid out of Shepherd's estate: and

it was held, by Sir John Leach, that the bill was right in point of form. That decision seems to me to be precisely in point: and, therefore, my opinion is that the plaintiff in this case, though he sues on behalf of himself and all other the creditors of the two deceased co-partners, (which means the joint as well as the separate creditors,) is entitled to that more ample relief which he has sought, by his prayer, against both the [*289] separate estates and the joint *estates.(a) The result is that I am bound to disallow the grounds of demurrer which are assigned upon the record.

Then the demurrer *ore tenus* is for want of parties. It is perfectly manifest that this bill has been defectively constructed; because it is obvious that the suit cannot proceed without a representative both of Sedgwick and of Douglas. What is represented is that the persons who are named as executors in the will of Douglas, have not nor have any of them proved the will: an averment which is quite consistent with the fact that administration *cum testamento annexo*, may have been ganted of his personal estate.

I have looked at the case of *Mortimer* v. *Fraser*, and also at the cases which Mr. Fry, the registrar, supplied the Lord Chancellor with when the matter was before him; and it appears to me that there is no general rule to be extracted from those cases. The Lord Chancellor appears to have approved of what was done, by the Court below, in hearng the demurrer in *Mortimer* v. *Fraser*, where the demurrer on the record, was overruled; but the demurrer, as it is called, *ore tenus*, was allowed: and, in that case, the demurrer on the record, was overruled with costs, and the demurrer *ore tenus*, was allowed without costs. I apprehend that the phraseology is not quite correct; because, in fact, there is but one demurrer. Certain reasons are assigned, on the record, in support of the demurrer; and other reasons are assigned, at the bar; but, still, it is but one demurrer. It does not appear, from the report of *Mortimer* v. *Fraser*, what was the precise form of the bill.

(a) No relief was prayed against the joint-estates.

*With respect to this present bill, I am very much [*290] disposed to think that, after it had passed from the hands of counsel, some finishing touches were given to it by parties who thought they knew either more of the case or more of the law than the counsel did; and the effect is that the bill, so far from being improved, has been made palpably defective.

I think that the defect, which has been taken advantage of by assigning the reason in support of the demurrer at the bar, namely, the want of parties, is so perfectly obvious that I ought to do this, namely, to allow the demurrer on the ground stated at the bar, giving no costs. For as, if the demurrer had been overruled for the reasons which are assigned on the record, I should have overruled it with costs; so I should have allowed the demurrer for want of parties with costs. Therefore, the fair way is merely to allow the demurrer for want of parties without costs: but I shall give the plaintiff liberty to amend generally.

The order was drawn up as follows: The matter of the demurrer put in, by the defendants Ann Douglas and J. H. Douglas, to the plaintiff's bill, coming on this day to be argued before this court in the presence of counsel learned for the plaintiff and for the said defendants, and the said demurrer being opened, upon debate of the matter and hearing what was alleged by the said counsel on both sides, this Court held the said demurrer to be good and sufficient, and doth therefore order that the same do stand and be allowed for want of parties, but without costs; and it is ordered that the plaintiff be at liberty to amend his bill, as he may be advised, on payment of 20*s*. costs to the said defendants, and undertaking to amend the same within six weeks from this time.

1840.—Kekewich v. Langston.

[*291] *KEKEWICH *v.* LANGSTON.

1840: 27th and 30th November, and 4th Dec.

By a marriage settlement, sums of stock, the wife's property, were settled in trust for the husband during the joint lives of himself and his wife; with remainder to the survivor for life; and it was declared that, if the husband should survive and marry again, and there should be issue of the marriage then living, his life interest in a moiety of the funds should cease, and that moiety should be transferred to the same persons, and be applied to the like purposes and in the like manner, as it would be tranferable and applicable to if the husband were dead. Then followed trusts of the funds for the children as the husband and wife should jointly appoint, and as the survivor should appoint; and, in default of any appointment, for all the children (except an eldest or only son, who, for the time being, should become entitled, in possession or remainder, to the husband's real estates under a deed of even date,) the shares to be vested in the children at the usual periods but not to be transferred until the death of the surviving parent. And it was declared that, after the death of both parents, the trustees should apply so much, as they should think fit, of the income of each child's share, until its share should become transferable, for its maintenance, and should accumulate the surplus: and the trustees were empowered, after the death of both parents, to advance the children out of the capital of their shares, notwithstanding they should be under 21. The wife died. There was issue of the marriage four sons and three daughters, all infants. The husband appointed part of the funds to his eldest son, and then married again. The court refused to direct (without a reference as to the husband's ability) the income of the moiety of the funds which the husband forfeited by marrying again, to be applied for the children's maintenance, there being, in consequence of the exception of an eldest or only son, &c., a suspension of the trust for the benefit of the children, during the father's lifetime.

BY the settlement on the marriage of Mr. and Mrs. Kekewich, dated the 31st of March, 1820, sums of stock to a large amount, the lady's property, were settled in trust for Mr. Kekewich, during the joint lives of himself and his wife, and for the survivor of them for his or her life; and it was declared that, in case Mr. Kekewich should survive his wife, and, after her decease, should intermarry with any other woman, then and in such case, and also in case there should be any children or child of Mr. *and Mrs. Kekewich, or the issue of any such children [*292] or child living at the time of the marriage again of Mr. Kekewich, then, from and immediately after his so marrying

again, his life estate in one moiety of the dividends of the trust-funds, should absolutely cease and determine, and, then and from thenceforth, one moiety of the trust-funds and also one moiety of the dividends thereof, should be paid and transferred to such and the same persons, and be applied to such and the like purposes, and in such and the like manner, as the same would have been payable, transferable or applicable to, in case Mr. Kekewich had been actually dead, anything therein contained to the contrary thereof notwithstanding: and it was further declared that, from and after the decease of the survivor of Mr. and Mrs. Kekewich, the trustees should stand possessed of the trust-funds, upon trust for all and every or such one or more of the children of Mr. and Mrs. Kekewich, and for all and every or such one or more exclusively of the other or others of any issue (born in the lifetime of Mr. and Mrs. Kekewich, or in the lifetime of the survivor of them) of any such child or children, with such provision for their respective maintenance and education, and at such age, day or time, or respective ages, days or times (not happening after 21 years, to be computed from the decease of the survivor of Mr. and Mrs. Kekewich,) and, if more than one, in such shares and proportions, and subject to such conditions, restrictions and limitations over (such limitations over to be to or for the benefit of some one or more of the children or issue) as Mr. and Mrs. Kekewich should jointly appoint, and, in default of such appointment, then as the survivor of them should appoint, and that, in default of any such appointment, then the trust-funds should be upon trust for all and every of their children (except an eldest or only son, who, for *the time being, should [*293] be entitled, by virtue of a certain indenture of settlement of even date therewith, to the manors and other hereditaments therein described or referred to, for an estate tail in possession or in remainder immediately expectant upon the determination of the several life estates thereby created) equally to be divided among them, share and share alike; and, if there should be but one such child (other than and except as aforesaid) then for such only child, the share of every son to be vested at 21, and the share of every daughter to be vested at that age or on mar-

riage, but not to be paid or transferred until the death of the surviving parent: provided that, if there should be more than one child who should become entitled to a share in the trust-funds, and any of them, being a son or sons, should die or become an eldest or only son for the time being entitled as aforesaid, or, being a daughter or daughters, should die before the share or shares thereby intended for him, her or them respectively should so become vested as aforesaid, then (if no direction or appointment should be made by their parents, or the survivor of them, to the contrary) as well the original share thereby intended for every such younger son so dying or becoming an eldest or an only son and so entitled as aforesaid, and for every such daughter so dying as aforesaid, as also the share or shares which, by virtue of the present clause, should have survived or accrued to him, her or them respectively, or so much thereof as should not have been previously applied for his, her or their preferment or advancement in the world by virtue of the power thereinafter for that purpose contained, should, from time to time, accrue to the survivors and survivor and others and other of such children (not being an eldest or only son for the time being entitled as aforesaid), and, as far as circumstances would admit, [*294] should vest in and be paid to him, *her or them, (if more than one,) in equal shares, at such time or times, and in such manner, as was thereinbefore declared concerning his, her or their original shares of the trust premises and the interest, dividends and annual produce thereof. And it was also declared that, after the decease of Mr. and Mrs. Kekewich, the trustees should stand possessed of the trust-funds, or of the unappointed parts thereof, upon trust to pay and apply the interest and dividends of the respective shares therein of the said children, for and towards their maintenance and education until their respective shares should become payable or transferable, or to pay and apply so much of such interest and dividends as the trustees should, in their discretion, think fit: and, in case the whole of the interest and dividends of any child's share should not be applied for his or her maintenance and education, then the surplus thereof should, from time to time, be laid out, when the same

should amount to a competent sum, on real or parliamentary or government security, at interest, in the names of the trustees, who should be possessed thereof upon the same trusts, and with, under and subject to the same powers, provisoes and declarations as were therein contained concerning the share from which such surplus of interest or dividends should arise, or as near thereto as the circumstances of the case would permit: and the trustees were empowered, at any time or times after the decease of the survivor of Mr. and Mrs. Kekewich (or in their lifetimes or in the lifetime of the survivor of them, if they or such survivor should so direct,) to levy and raise, out of the trust-funds or out of the unappointed parts thereof, any part (not exceeding one-half) of the share or shares therein of any son or sons of the marriage, notwithstanding he or they should not have then attained 21, and to pay and apply the money so to be raised, for the preferment or advancement in the world, or otherwise to or for the benefit of such son [*295] or sons: and it was further declared that, in case there should be no children or child of the marriage (except an only son so entitled as aforesaid,) or being such, if all of them should die before they acquired vested interests in the trust-funds, then the whole of those funds, or the unappointed or unadvanced parts thereof, should be upon trust for such only son of the marriage: and in case there should be no child of the marriage, or, being such, if all such of them as should be sons should die under 21, and all such of them as should be daughters, under that age without having been married, and also in case Mrs. Kekewich should survive her husband, the trust-funds, or the unappointed or unadvanced parts thereof, should be in trust for Mrs. Kekewich, for her own absolute use and benefit; but, in case there should be no such child or children, or there should be such failure of children as last aforesaid, and Mrs. Kekewich should die in her husband's lifetime, then it should be lawful for Mrs. Kekewich, (but subject, and without prejudice to her husband's life estate in the dividends of the trust-funds) to appoint the trust-funds, by her will, to such person or persons, &c., as she should think fit; and, in default of any such last-mentioned appointment, then one moiety of the trust-

funds, or of the unappointed or ineffectually appointed parts thereof, should be in trust for Mr. Kekewich, for his own absolute use and benefit, and the other undivided moiety, in trust for such person or persons of Mrs. Kekewich's blood and kindred living at her decease, as, by virtue of the statute of distributions, would have become entitled to her personal estate in case she had died intestate and unmarried.

There was issue of Mr. and Mrs. Kekewich four sons and three daughters, all of whom were still infants. The eldest
[*296] *son was entitled, by virtue of the settlement referred to in the indenture before set forth, to the manors and other hereditaments therein described, for an estate tail in remainder immediately expectant on the determination of the several life-estates thereby limited. Mrs. Kekewich died in September, 1826. No appointment was made by virtue of the powers in the settlement, except that, on the 3d of June, 1840, Mr. Kekewich appointed a portion of the trust-funds to his eldest son, subject to his own life interest therein; and, on the 9th of the same month, he married again.

The bill was filed by the children of Mr. Kekewich's first marriage: and the question was whether, as Mr. Kekewich, on his second marriage, forfeited his life interest in a moiety of the income of the trust-funds, such moiety became applicable (as his answer submitted,) as if he were dead, and consequently, the forfeited moiety of the income of the trust-funds, comprised in the appointment, ought to be applied for the maintenance and education of his eldest son, and the forfeited moiety of the income of the rest of the trust-funds ought to be applied for the maintenance and education of his younger children.

Mr. *Knight Bruce* and Mr. *S. P. White*, for the plaintiffs: The question is whether the trust for the maintenance of the younger children of the marriage, is a trust for the benefit of the father. We submit that is not a trust of that description. It is true that there may be a trust which, though it is, in words, for the maintenance of the children, yet is, in fact, a trust for the father. *Stock-*

en v. *Stocken*.(*a*) In this case, however, it is impossible *that the trust for the maintenance of the children, should [*297] have been intended for the benefit of the father; for it is not to take effect until the father and mother are both dead, and so much only of the income of the trust funds as the trustees, in their discretion, shall think fit, is to be applied for the maintenance of the children, and the surplus is to be accumulated. At all events, there must be a reference, to the Master, to inquire as to the ability of the father to maintain his children: and to that we do not object.

Mr. *S. P. White* referred to *Andrews* v. *Partington*(*b*) and to *Meacher* v. *Young*,(*c*) and said that, in the latter of those cases, a sum of stock was settled in trust for the separate use of the wife, for life, with remainder in trust for the sons of the marriage at 21, and for the daughters at that age or on marriage, and, until their shares should become payable, in trust to apply the dividends of the stock for their maintenance and education; so that the trust for maintenance took effect immediately on the death of the wife, whether the husband was living or not: that the clause in the settlement in this case, which provided that, if Kekewich should marry again, his life-estate in one moiety of the dividends of the trust-funds, should cease, and one moiety of the funds should be transferred to the same persons, and be applied to the like purposes, and in the like manner as it would have been transferable or applicable to in case he were dead, had not, (as the counsel for Mr. Kekewich would contend it had,) the effect of accelerating the trust for maintenance as well as the other trusts of the settlements; but the meaning of the words: "In case the said Samuel Trehawke *Keke- [*298] wich had been actually dead," was that one moiety of the trust-funds should go over to the same persons as if his life estate had ceased.

Mr. *Coleridge* appeared for the trustees.

(*a*) Ante, Vol. IV. p. 152; and 4 Myl. & Cr. 95.

(*b*) 2 Cox, 223.

(*c*) 2 Myl. & Keen, 490.

1840.—Kekewich v. Langston.

Mr. *Jacob* and Mr. *James Parker*, for Mr. Kekewich: Where a provision for the maintenance of children, is made by a third person, as it was in *Andrews* v. *Partington*, the father is not entitled to the benefit of it; but, where it is made by a deed to which the father is a party, when it is a matter of contract with him, and he is entitled to the benefit of it, whether he is of ability to maintain his children or not. Is it reasonable to suppose that it was the intention of Mr. Kekewich or of any of the other parties to the settlement, that if Mr. Kekewich should be deprived of the income of a moiety of the trust-funds, he should still have to maintain his children as if he were in the receipt of the whole of the income? The effect of the clause on which the question arises, is to accelerate the trust for the children with all its appendages, that is, the provisions for their maintenance and advancement. By that clause, the father's marrying again is made equivalent to his death; and, therefore, though, in the subsequent clauses, his death only is spoken of, yet it is nothing more than a compendious mode of expressing his second marriage as well as his death. *Stocken* v. *Stocken*; *Meacher* v. *Young*; *Mundy* v. *Earl Howe*.(*d*) This last case is on all fours with the present; and we submit that the Court ought to declare that the father is entitled to have the whole or a competent part [*299] of the income of *the forfeited moiety of the trust-funds applied for the maintenance and education of his children; and that there should be a reference to the Master to inquire what is proper to be allowed for those purposes; but no reference as to the ability of the father to maintain and educate his children.

Mr. *Knight Bruce*, in reply:—In *Mundy* v. *Earl Howe*, no life interest was given to the father of the infants; and, in *Stocken* v. *Stocken*, and in *Meacher* v. *Young*, though there was a trust for the father, yet the provision for the children preceded it, and that trust was not to take effect, except in the event of there being no son who should attain 21, and no daughter who should attain that age or marry. Those cases, therefore, are clearly

(*a*) 4 Bro. C. C. 223.

distinguishable from the present; for it is manifest that, in those cases, the provisions for the maintenance of the children were intended to take effect in the father's life-time, and consequently, to be for his benefit. In *Stocken* v. *Stocken*, Lord Cottenham's judgment proceeds on this ground, namely, that the order in which the trusts of the settlement were declared, showed that the authors of the settlement had in contemplation children of the mother left in minority, and the father surviving. His Lordship adds: "And there is an express trust that, after the mother's death, the trustees should apply the rents towards their respective maintenance and education, contemplating the father being alive. It comes, therefore, precisely within the principle of *Mundy* v. *Earl Howe*, which was acted upon in the recent case of *Meacher* v. *Young*. The father is, undoubtedly, bound to maintain and educate his children: but it is competent for a father to contract that certain property shall be applied to those purposes. He did so contract *in those [*300] two cases; and, in this case, he makes a similar contract. I have no doubt, therefore, that the true construction of that provision is that the father is, as against the debt, viz., the amount of rents and profits due from him, to be allowed a sufficient sum for maintenance and education."(a) This shows that the question, in cases of this nature, is whether the trust for maintenance is for the benefit of the father, or for the benefit of the children. I submit that, in this case, the trust is plainly intended for the benefit of the children; and, consequently, Mr. Kelwich is not entitled to any allowance for his children's maintenance, unless the Master shall find that he is not of ability to maintain them.

THE VICE-CHANCELLOR:—Before I decide the question in this case, I will read over the settlement; for I always feel more satisfied about the construction of part of an instrument, when I have read the whole of it.

30*th November*.—THE VICE-CHANCELLOR:—Since this case

(a) See 4 Myl. & Cr. 97 and 98.

was argued, I have read through the settlement on the marriage of Mr. and Mrs. Kekewich, and I cannot but think, that according to the true construction of the instrument, the trust to accumulate the dividends of that moiety of the trust-funds which, in the event that has happened, was to go as if Mr. Kekewich was dead, has taken effect; because there is great difficulty in giving any other construction to the settlement. The clause on which the question arises, directs that, in case Mr. Kekewich should survive his wife, and intermarry with any other
[*301] woman, and in case there should be any *issue of the first marriage living at the time of the second marriage: "then his life estate, in one moiety or half part of the said interest or dividends, shall absolutely cease and determine, and then, and from thenceforth, one moiety or half part of the said trust-moneys, stocks, funds, and premises, and also one moiety or half part of the interest, dividends, and annual proceeds thereof, shall be paid and transferred to such and the same persons, and be applied to such, and the like purposes, and in such and the like manner, as the same would have been payable, transferable or applicable to, in case the said Samuel Trehawke Kekewich had been actually dead, anything herein contained to the contrary thereof notwithstanding." Then, with respect to the entirety of the stocks and funds, in default of their being any appointment by the husband and wife, or the survivor, the trust is for all and every of the children of the marriage, other than and except an eldest, or only son, who, for the time being, by virtue of a certain indenture of settlement of even date therewith, should be entitled to the manors, and other hereditaments therein described, for an estate tail in possession, or in remainder, immediately expectant upon the determination of the several life-estates thereby created: and then there follows the clause of maintenance, by which it is declared that, after the decease of the survivor of the husband and wife, the trustees shall stand and be possessed of the trust-moneys, upon trust to pay and apply the interest and dividends of the children's respective shares thereof, for and towards their maintenance and education, until their shares shall become payable or transfera-

ble, or to pay and apply so much of such interest and dividends as they shall think fit; and that, in case the whole income of any child's share shall not be applied for his or her maintenance and education, then the surplus thereof *shall, [*302] from time to time, be laid out to accumulate. Next follows the advancement clause, which is, that it shall be lawful for the trustees, after the decease of the survivor of Mr. and Mrs. Kekewich, "to levy and raise, out of the said trust moneys, stocks, funds, and premises, or out of the unappointed parts thereof, any part, not exceeding one-half of the share or shares therein, of any son or sons of the said S. T. Kekewich and Agatha Maria Sophia his intended wife, notwithstanding he or they shall not then have attained the age of 21 years, and to pay and apply the money, so to be raised, for the preferment and advancement in the world, or otherwise, to or for the benefit of such son or sons."

Now, it appears to me that the whole must be considered together: and if you find that there is a set of circumstances provided for, which comprehends the case of the father being actually alive, so that it is uncertain whether the eldest son will be the person, who, under the provisions of the settlement referred to, will become entitled to the manors and other hereditaments therein described,(a) it necessarily follows, that there must be a suspension of the trust, for the benefit of the children, until the event shall happen, whereby it shall be determined whether the eldest son ought to be a participator or not. The maintenance clause and the advancement clause must be taken together; and it is clear that it was intended to exclude the eldest son in the event of his becoming entitled to the manors and *other hereditaments referred to. During the life of [*403] the father, it cannot be determined whether he will become entitled or not; and it is quite plain that the event that

(a) The limitations of the settlement of even date with the settlement on which the question arose, were not set forth in the pleadings: it appeared only that the estates therein comprised, were Mr. Kekewick's family estates, and that he had charged them with 10,927*l.* in favor of his younger children.

was to determine whether he would become entitled or not, was the death of the father.

My opinion, therefore, is that all that can be done at present, is to direct that the moiety of the trust-funds shall accumulate during the life of the father. Of course, if the father should not be of ability to maintain his children, then there must be a reference, in order that, some maintenance being absolutely necessary, it may be provided for the children out of the trust-funds.

After the judgment had been delivered, Mr. *Jacob* said, that the ground of his Honor's decision had not been touched on in the course of the argument, but was entirely new. Upon which the Vice-Chancellor allowed the cause to stand over, until the 4th of December, for further argument.

4th December.—Mr. *Jacob* and Mr. *Parker*:—The question, which of the younger children will become entitled to the trust-funds, and in what shares, is quite independent of the time of Mr. Kekewich's death. The eldest son, being entitled to an estate-tail in remainder in the real estates comprised in the settlement of even date, never can become entitled to any share of the trust-funds, in default of appointment. He is not one of the class in whose favor the trust is declared; therefore, he is excluded *ab origine*. But if any younger son should [*304] attain 21, he would become entitled *to a share of those funds; and would not lose it, although he might afterwards become entitled to an estate-tail in the real estates, either in possession or in remainder immediately expectant upon the determination of the then subsisting life estates. *Windham* v. *Graham*.(a) The present younger children are presumptively entitled to shares of the trust-funds: they may lose them either by dying under 21, or by becoming entitled to a remainder in tail in the real estates, before their shares vest. Those two events are to be considered as precisely alike for the present

(a) 1 Russ. 331.

purpose. The trust for maintenance, which has been brought into operation by Mr. Kekewich's second marriage, is of no use after the children attain 21: but is applicable, solely, to the children being, as they now are, presumptively entitled to shares of the trust-funds. It gives maintenance out of their presumptive shares: therefore, it contemplates their losing their shares, or rather, never becoming absolutely entitled to any, by their becoming tenants in tail in remainder of the real estates, as well as by their dying under 21. Consequently, a child who may afterwards lose his share by becoming tenant in tail in remainder of the real estates, is as much entitled to maintenance, as he would be if he could lose his share by dying under 21.

THE VICE-CHANCELLOR:—I do not think that those clauses in the settlement, which apply to the entirety of the trust-funds, are expressed in such a manner as to make them applicable to that moiety of the income of the trust-funds, which is made to go over on Mr. Kekewich's second marriage. At all events there is so much difficulty in determining *who [*305] are the parties entitled, in consequence of this clause which directs that the moiety shall go over, that nothing can be done, as to it, at present.

The decree referred it to the Master, to inquire and state whether Mr. Kekewich was in circumstances and of ability, having regard to his situation and circumstance, and the state of his family, to maintain and educate the plaintiffs according to their station and prospects; and, if the Master should find that he was not, then to inquire and state the ages of the plaintiffs, and the nature and amount of their fortunes, and to consider what was proper to be allowed to their father, for their maintenance and education from his second marriage and for the time to come.

1840.—Glasscott v. Copper-Miners' Company.

GLASSCOTT *v.* THE GOVERNOR AND COMPANY OF THE COPPER-MINERS OF ENGLAND.

1840: 3d December.

A defendant at law may file a bill of discovery, not only to sustain his defence to the action, but to rebut the evidence in support of it.

The rule that officers of a corporation may be made co-defendants to a bill against the corporation, applies to a bill for discovery as well as to a bill for relief; and members of the corporation may be joined with the officers.

If officers of a corporation are made co-defendants to a bill for a discovery and an injunction to stay an action brought by the corporation, the injunction will be dissolved on the coming in of the answer of the corporation, although the officers have not answered.

THE Company, which was a body corporate, having brought an action, against the plaintiffs, for the recovery of a sum of money alleged to be due under a contract entered into between the parties in August, 1839, the plaintiffs filed the bill in this cause, for a discovery only. The matters alleged in the bill, and of which a discovery was sought, tended not to support [*306] a case intended to be *made, by the plaintiffs, by way of defence to the action; but to defeat the case necessary to be made, by the Company, in order to sustain their action. The governor, deputy chairman, one of the directors, and the secretary of the Company, were made co-defendants to the bill, and they and the Company were charged with having in their custody, books, accounts and other documents relating to the matters in the bill, and by which, if produced, the truth of the matters stated in the bill, would appear. All the defendants, except the Company, joined in demurring to the bill.

Mr. *Jacob* and Mr. *Loftus Wigram*, in support of the demurrer: On the face of this bill, there is no case entitling the plaintiffs to a discovery. They do not allege that they have any defence to the action for which they require the discovery. The object of the bill is, simply, to discover the case of the Company at law. The rule of this Court is clear: a party may have a discovery of

his own case or title, but not of his adversary's case or title. What use is there in asking us to disclose what our evidence is at law? The allegations of the bill amount to this, namely, that there was no such contract as that of August, 1839. The answer is that, if we do not prove our case at law, we shall be non-suited. If the bill cannot be supported against the Company, it clearly cannot be supported against the demurring defendants.

Secondly: If the bill can be sustained against the Company, it cannot be sustained against the other defendants. For a plaintiff cannot make an officer of a corporation, a co-defendant to a bill which seeks for a discovery only, although he may make him a party to a bill which seeks for relief against the corporation: and, *even in the case of a bill for relief, [*307] Lord Eldon treats the practice as an anomaly, and as established, not on principle, but by authority. *Fenton* v. *Hughes*;(a) *Dummer* v. *The Corporation of Chippenham*;(b) *Le Texier* v. *The Margravine of Anspach*.(c)

Thirdly: Supposing that an officer of a corporation may be made a co-defendant, with the corporation, to a bill of discovery, the anomaly cannot be extended further. In this case, however, not only the secretary, but three members of the company are made co-defendants. Neither their answers nor the answer of the secretary, can be read against the company at the trial of the action. The fact is that the object of the plaintiffs in filing this bill, was to enable them to determine whether they should call the secretary and the three members of the company, as witnesses at the trial of the action, or not: their object was to gain assistance in the conduct of their action at law, not in the conduct of their suit in this Court.

Fourthly: No person can be made a defendant to a bill of discovery, unless he is a party to the record at law. *Irving* v. *Thompson*.(d)

Mr. *G. Richards* and Mr. *Heathfield*, in support of the bill:—

(a) 7 Ves. 287. See ante, Vol. IX. pp. 22 & 23.

(b) 14 Ves. 245. See 252.

(c) 15 Ves. 159; see 164.

(d) Ante, Vol. IX. p. 17.

The demurrer is a joint demurrer of all the four co-defendants, including the secretary; and, if it is bad as to him (which it clearly is) it is bad as to all the other demurring parties.

[*308] *The contract on which the action is founded, was a contract for the sale of some copper-ore to the plaintiffs. It does not appear, from the contract, whether the company were the vendors of the ore or not. Are we not entitled to have a discovery as to whether they were the vendors or not? Again; the bill avers that the contract was fictitious, and, in fact, never existed: are we not entitled to have a discovery as to that matter? At all events, we must be entitled to have the accounts produced, which are charged to be in the custody of the defendants: and, if we are entitled to any part of the discovery, the demurrer must be over-ruled.

It was said that an officer of a corporation cannot be made a co-defendant, with the corporation, to a bill for discovery, but only to a bill for relief. Now the reason for making the officer a co-defendant, is that the corporation do not answer on oath, and, therefore, the plaintiffs may not be enabled to obtain from them the required discovery. The object then of seeking the discovery, being to enable the party to make out his case, what difference can it make whether the discovery is required with regard to relief in equity, or with regard to a proceeding at law? In the one case, the party seeks the discovery in order to enable him to make out his case in equity; in the other case, he seeks it in order to make out his case at law. The reason for granting the discovery, applies to the one case as much as it does to the other. Besides, there are several cases which show that the distinction on which the counsel for the defendants rely, cannot be maintained. In *Wych* v. *Meal*,(*a*) the bill was for dis-

[*309] covery only: and a demurrer *by an officer of the East India Company, who had been made a co-defendant with the Company, was over-ruled. *Anon.*(*b*). In that case also the bill was a bill for discovery only; and it was ordered that the clerk of the Company, and such principal members of it as the

(*a*) 3 P. W. 310.

(*b*) 1 Vern. 117.

plaintiff should think fit, should answer on oath. In *Dummer* v. *The Corporation of Chippenham*, Lord Eldon says: "The ground of the demurrer on the record is," &c., &c.(*a*) So that your Honor sees that Lord Eldon makes no distinction between a bill for discovery and a bill for relief. In *Moodalay* v. *Morton*,(*b*) also, the bill was, simply, for discovery. Lord Redesdale says: "Unless a defendant has some interest in the subject, he may be examined as a witness; and, therefore, cannot, in general, be compelled to answer a bill for a discovery: for such a bill can only be to gain evidence, and the answer of the defendant cannot be read against any other person, not even against another defendant to the same bill * * *. There seems to be an exception to the rule in the case of a corporation; for, as a corporation can answer no otherwise than under their common seal, and, therefore, though they answer falsely, there is no remedy against them for perjury; it has been usual, where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make their secretary or book-keeper, or other officer a party: and a demurrer because the bill showed no claim of interest in the defendant, has been, in such case, over-ruled."(*c*) There Lord Redesdale makes no distinction between a bill for relief and a bill for discovery only. It is clear, therefore, that the demurrer is bad so far as the secretary is concerned;
*and, if it is bad as to him, it is bad as to all the other [*310] demurring parties. We contend, however, that the charge, in the bill, that the defendants, that is, all the defendants, have in their custody, books, accounts, &c., whereby, if produced, the truth of the matters alleged by the bill would appear, is sufficient to support the bill as against all the demurring parties.

Mr. *Jacob*, in reply:—Where a demurrer is by several parties, it may be good as to one of the parties, and bad as to another of them. *The Mayor and Corporation of London* v. *Levy*.(*d*).—[THE

(*a*) See 14 Ves. 251, 252, and 253. edit. 152, 153.
(*b*) 1 Bro. C. C. 469.
(*c*) Treat. Plead. 4th edit. 188, 189; 3d
(*d*) 8 Ves. 398.

VICE-CHANCELLOR: That is, where the demurrer is joint and several.]

The case of *Dummer* v. *The Corporation of Chippenham*, was a case of fraud and corruption, and certain individual corporators, who had taken an active part in doing the acts which the bill complained of, were made co-defendants. That is quite different from calling upon them to answer for the purpose of discovery. In *Moodalay* v. *Morton*, the distinction between the Company and their secretary was not suggested. It was a very extraordinary case; for it was a bill filed for a discovery and a commission to examine witnesses in aid of a non-existing action. That case was brought under the consideration of Sir John Leach, V. C., in *Angell* v. *Angell*.(*a*) His Honor does not express any opinion upon the point for which it was cited by the counsel for the plaintiffs; but gives what seems to be the correct exposition of the bill in that case; and concludes his observations with saying that the case, being a case of specialty and exception, rather disproved than affirmed the general propositions for which it had been cited in the case before him.

[*311] *The distinction between a bill for discovery, and a bill for relief was not so well established formerly, as it now is, and has been for several years past. Where the bill is for relief, the whole matter remains under the cogniziance of this Court; and this Court will have the answer of the secretary or other officer of the corporation, opened to it; but, where the bill is for discovery only, the Court has nothing to do with it after it has enforced the answer. Will this Court then enforce answers from several defendants, not to assist the plaintiff in conducting his case in this Court, but in conducting his defence at law? The answer of a married woman cannot be read against her husband, nor can it be read against herself, either during or after the coverture. The Court, however, requires her to put in a full answer; as it may be of great use in enabling the plaintiff to frame his interrogatories, and to know where he may procure evidence: but a married woman cannot be made a party to a bill of discovery against her husband.

(*a*) 1 Sim. & Stu. 83; see pp. 90 and 91.

1850.—Glasscott v. Copper-Miners' Company.

THE VICE-CHANCELLOR:—In this case the bill represents a variety of circumstances, many of which I do not see that there is any use in stating, except that they tend to make intelligible the terms of that which is really the subject of the dispute, namely, the contract of August, 1839; the language of which one could not even guess at the meaning of, unless there were a statement contained in the bill as to what was done both prior and subsequently to that agreement. Then it is represented that the Company of Copper Miners of England, have brought an action against the plaintiffs, in respect of the contract of August, 1839; and the bill contains averments, that that contract is fictitious, and that there was no such contract, and so on: and then it represents that *the demurring [*312] parties are officers of the Company. Then there is a statement, as to all the defendants, that they have the books and papers in their possession.

Then these four gentlemen, who have various characters as officers of the Company, have put in one general demurrer.

Now it strikes me that the plaintiffs at law may have evidence to support their case, which it may be necessary to rebut by other evidence: and I do not think that this is a bill merely for the purpose of making the plaintiffs at law admit that they have no case, but it is a bill which, if they do not admit that they have no case, seeks to make the present demurring defendants produce documents by means of which it may be shown, that though the plaintiffs at law may have some evidence in support of their case, yet, when the evidence for them is weighed against the evidence for the defendants at law, the balance will be turned against them.

Then the question is, whether such a bill can be sustained? In my opinion there is abundance of authority for sustaining such a bill. It is very remarkable that the second edition of Lord Redesdale's Treatise, which was published in the year 1787, contains, word for word, the same passage as we find in the fourth edition, which was published in his lifetime, and with his sanction, and which therefore does clearly show that his Lordship did, after the lapse of 40 years, entertain the opinion which

he published in the year 1787. Lord Redesdale was a great observer of what took place in this Court; and we can hardly suppose that he forgot the cases in which he himself had been engaged as counsel, *as he was in *Moodalay* v. *Morton*, which was heard in 1785. Now, though it may be perfectly true that the observation made by Sir John Leach, in the case of *Angell* v. *Angell*, may have contained very good reasons why the demurrer should have been allowed, so far as it was a bill for a commission, still his Honor's opinion, supposing it to be right, would be no authority against the proposition which is involved in the decision of that case, namely, that a bill for discovery only, may be filed against a corporation and its officers. And it appears to me that any observations which were made upon the collateral point concerning the commission, have nothing at all to do with the question, whether a bill of discovery only may be filed against a company and its officers.

[*313]

Then the language of Lord Redesdale, in both the editions to which I have referred, is in the most general form: "It has been usual," says his Lordship, "where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make their secretary or book-keeper, or other officer, a party."[1] And, if you may make any other

[1] Where the officers or agents of a corporation are made parties to a bill filed against the corporation, for the purpose of compelling an answer upon oath, and the complainant, by mistake, inserts a prayer for relief against such officers, as well as against the company, the officers cannot demur to the discovery and relief generally; but they should make the discovery sought, and demur to the relief; or should answer the bill generally, and then object, at the hearing, that they had been improperly made parties to the suit for relief as well as for discovery. The case of officers and agents of a corporation is an exception to the general rule that a person who has no interest in the subject matter of litigation, and who is a mere witness, cannot be made a defendant in a bill in chancery; but they can only be made parties for discovery where relief is sought against the corporation, and not where the whole relief claimed is against persons other than the corporation. Where the officers or agents of a corporation are made parties to a bill in chancery, for the purpose of obtaining a discovery of facts within their knowledge as such officers or agents, it is not necessary for the complainant to show, in his bill, that they alone are acquainted

officer than a secretary or a book-keeper a party, which this language plainly imports, it seems to follow that you may make not only the secretary, but the governor, and the deputy-governor, &c., and any other person a party, with respect to whom there is an averment that he has, or that he and others have in their custody books and papers which relate to the matters in the bill mentioned, and whereby the truth of those matters would appear. And I cannot but think, notwithstanding all that has been said on this subject, that I am actually bound by the authority which I find, which I must take to have been considered as the law for the length of time from 1787 to *1827, [*314] and which I myself have always understood to be the law of the Court.

The result is that this demurrer must be overruled.

Demurrer overruled.

9th December.—The Company, having filed their answer, obtained an order *nisi*, for dissolving the injunction: and

Mr. *Loftus Wigram* now moved to make that order absolute. He cited *Joseph* v. *Doubleday.*(*a*)

Mr. *Heathfield*, for the plaintiffs:—Your Honor has decided that the officers of the Company have been rightly made co-defendants to the bill. They have not yet put in their answers; and, before the time which they have obtained for that purpose expires, the action will be tried. Consequently, it will be useless to hold that the officers may be made co-defendants, unless you decide that the injunction is to continue until they have answered the bill.

with the facts as to which an answer is sought. It is sufficient if it appears that the facts charged in the bill are material to the relief sought against the corporation, and are known to the officers or agents as such. *Mowy* v. *The Beekman Iron Co.*, 9 Paige Ch. R. 188.

(*a*) 1 V. & B. 497.

1840.—Horncastle v. Charlesworth.

THE VICE-CHANCELLOR said that, as the Company had put in their answer, it was quite a matter of course to make the order, for dissolving the injunction, absolute.

[*315] *HORNCASTLE *v.* CHARLESWORTH.

1840: 3d December.

A bill in equity will not lie for a partition of copyholds.

THE question in this case, which was raised by a demurrer, was whether a court of equity could decree a partition of copyholds, between tenants in common in fee, without the license of the lord of the manor

Mr. *Hodgson*, and Mr. *Kenyon Parker*:—Joint-tenants, and tenants in common were not compellable to make partition, until the 31st Hen. 8, c. 1, and 32 Hen. 8, c. 32, which first gave the remedy by writ of partition. It was held, however, that those statutes did not include copyholds, as the remedy by writ was not applicable to them. Co. Litt. 187, *a*, note 71, Harg. and Butler's edition. Coke's Complete Copyholder, sect. 54.

In order to show what has been the course of decision on the point, we refer to *Scott* v. *Fawcet*;(a) *Hull* v. *Freeth*;(b) *Whitchurch* v. *Holworthy*;(c) *Burrell* v. *Dodd*;(d) *Oakley* v. *Smith*.(e)

Mr. *Jacob*, and Mr. *Elmsley*:—Although the lands of which a partition is sought, are called copyholds in the bill, they are customary freeholds, as they appear, from the admittances, not to be held at the will of the lord.(g) The writ of partition is

(a) 1 Dick. 299.

(b) 1 Madd. Prin. & Prac. 332, note, 3d edit.

(c) Ibid.

(d) 3 Bos. & Pull. 378.

(e) 1 Eden, 261.

(g) It seems that customary freeholds are not within the acts of Hen. 8; see *Burrell* v. *Dodd*, *ubi sup.*

abolished by 3 & 4 Wm. 4, c 27, sect. 36, and so also *is the proceeding by plaint in the lord's court, which, [*316] as appears by the earlier cases, was the only mode of effecting a partition of copyholds. The legislature, however, when it passed that Act, meant not to abolish partition entirely, but to leave untouched the equitable jurisdiction in cases of partition, not considering it as dependent on the jurisdiction, either at common law or by statute.—[THE VICE-CHANCELLOR: The Act simply abolishes legal partition: there is no allusion, in it, to equitable partition.]—On a writ of partition, the judgment is for the parties to hold in severalty: therefore, a legal title would be given without the lord's concurrence: but a court of equity decrees a partition to be effected by surrenders in the lord's court.—[THE VICE-CHANCELLOR: The lord, on the admittance of a copyholder, is entitled to the accustomed fine; but who can say what is the accustomed fine on admittance to a tenement which never before existed?]—The jurisdiction of this Court, with respect to partition, is not only exercised in a different manner, but it is more extensive than it is at common law. This Court deals with complicated interests in a manner that a court of common law cannot. It can decree money to be paid for owelty of partition: and, if one of two co-parceners aliens, the alienee cannot have partition at common law; but may have it in this Court. *Dodson* v. *Dodson*;(a) *Swan* v. *Swan*;(b) *Baring* v. *Nash*;(c) Vin. Ab. Tit. Partit. pl. 36; *Gaskell* v. *Gaskell*.(d)

THE VICE-CHANCELLOR:—I have always considered the question that has been *raised by the demurrer in [*317] this case, to be settled. I well remember that the question was decided by Sir William Grant, in *Shewen* v. *Kirwan*, in 1811:(e) since which time I have never met with a person

(a) Allnatt on Partit. 94; and 2 Watk. on Copyholds, p. 153, note, Coventry's edit.

(b) 8 Pri. 518.

(c) 1 V. & B. 551; see 555.

(d) Ante, Vol. VI. p. 643.

(e) Not reported.

who had a doubt about it. There formerly was a floating opinion that a partition of copyholds might be decreed, but it soon subsided. Where freeholds and copyholds are held together in common, as in *Dodson* v. *Dodson*, there may be a partition, in one sense, by giving all the copyholds to one, and all the freeholds, and, if necessary, money for equality of partition, to the other. But since that decision by Sir William Grant, to which I have referred, I have never heard it so much as hinted that this Court had jurisdiction to make a partition of copyholds alone.

This Court has never extended its jurisdiction to any new subject, but, when dealing with an old subject, has dealt with it in its own way: and if this Court, on a bill being filed for a partition, finds persons variously entitled, in undivided shares, to partial interests, it will take care that no injury shall be done, by directing that, by the form of the conveyance, the parties shall have the same interests in the divided shares, as they before had in the undivided shares. So that the jurisdiction exercised by this Court in cases of partition, is, in effect, an improvement on the jurisdiction as it existed at law, but this Court has never assumed a jurisdiction over copyholds.

My opinion is that the filing of the bill in this case, is a pure experiment: and, therefore, the demurrer must be allowed with costs.

*Heriz *v.* Riera. [*318]

1840: 15th and 17th December.

A. and B. were Spanish subjects, resident in Spain. A. having entered into a mercantile contract with the Spanish government, agreed with B., to allow him a share of the profits. Some years afterwards, B. died, and A. went, first, to France, and afterwards came to England. After he had left Spain, he frequently wrote to the plaintiffs (who where resident in France, but had taken out administration to B. in this country,) promising to settle with them for B.'s share of the profits of the contract; but not having done so, they filed a bill against him to enforce the agreement. A. pleaded that the agreement was illegal and void by the laws of Spain, as, at the time it was entered into, B. held an office of trust and confidence under the Spanish government: and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties, and a criminal prosecution. It was objected, first, that the plea was double, as the first part applied to the discovery and relief, and the latter part to the discovery only: secondly, that the particular law of Spain by which the agreement was nullified, ought to have been set forth: thirdly, that B. was dead, and, therefore, no longer subject to pains and penalties; and, fourthly, that A., after he had left Spain, had recognised the agreement, and promised to perform it. The Court, however, allowed the plea.

The bill stated that the defendant (who was described as formerly of Madrid, but then of the Clarendon hotel, Bond-St.) on or about the 11th of June, 1827, entered into a contract, with the Spanish Government, for providing tobacco for the Royal manufactories of Spain for five years, from June, 1828, at the prices mentioned: that the capital intended to be employed in the execution of the contract was estimated at 60,000*l.* sterling: that the defendant, soon after he had entered into the contract, came to an agreement with Don Pio de Elizalde, late of Madrid, deceased, that Elizalde should participate in the profits of the contract, to the extent of one-fifteenth, with a nominal capital of 4,000*l.* sterling; but it was agreed, between the parties, that although Elizalde was to participate in the profits of the contract to the extent of one-fifteenth, yet *that, in consideration of some important services which he had previously rendered to the defendant, the defendant would not call upon him for more than one-half of such nominal capital; and [*319]

that, in the event of the contract not turning out profitable, the defendant would not call upon Elizalde to contribute more than one-thirtieth of the loss that should be sustained thereby: that, accordingly, the defendant wrote and sent, to Elizalde, a letter dated the 20th of June, 1828, which was set forth in the bill, and which contained the terms of the agreement. The bill then stated that Elizalde accepted the proposal contained in the letter, and signified, to the defendant, his assent thereto: that the defendant continued to supply the royal manufactories of Spain with tobacco under the contract, from June, 1828, until June, 1833, by which he realized very large profits, to one-fifteenth of which Elizalde was entitled under the agreement; but the defendant never paid, either to Elizalde or to his representatives, anything on account thereof; and all accounts in respect thereof, between the defendant and Elizalde's estate, still remained open and unsettled, and several thousand pounds were due to Elizalde's estate, in respect of the matter aforesaid: that Elizalde died, in October, 1836, intestate, and that, soon after his death, the plaintiffs, his sisters (who were described as of St. Jean de Luz in the kingdom of France,) procured letters of administration to his estate, from the Prerogative Court of the Archbishop of Canterbury. The bill then set forth three letters written, in the years 1836, 1837 and 1838, by the defendant (who was then in Paris and shortly afterwards came to reside in England,) to the plaintiffs, in which the defendant promised to account for and pay to them, as soon as he should be able, the share of
[*320] the profits of the contract to which Elizalde's estate *was entitled. The charging part of the bill contained two letters from the defendant to Elizalde, one dated in 1831, and the other in 1832: in the former the defendant stated that he had made a partition of funds in the tobacco undertaking, and had credited Elizalde with his share, and that, as soon as he should have realized some credits, which he expected to obtain without delay, he would advise Elizalde of another partition: and, in the latter, he stated that Elizalde might dispose of 200,000 reals, in lieu of 180,000, as per first advice, and that he trusted he should be able to give Elizalde, without great delay, another advice

of a similar nature. The bill then charged that the defendant had invested part of his profits in the funds of this country, and various other matters with a view to obtain a discovery of them: and it prayed for an account and payment of what was due, from the defendant, to Elizalde's estate, in respect of the profits of the contract.

The defendant put in the following plea: "This defendant, by protestation, &c., doth plead in bar to the said bill, and for plea saith that, at and prior to the date and making of the alleged agreement in the said bill alleged to have been come to, by this defendant, with Don Pio de Elizalde in the said bill mentioned, he, the said Don Pio de Elizalde, was a public officer and agent of the Spanish Government in the said bill mentioned, and then holding, as such public officer and agent, an office or offices of trust and confidence under the said government, to wit, the office of Tresuero General del Rieno, which, being translated into the English language, means Chief Treasurer of the Kingdom, and likewise the office of Consegero de Estado, which, being translated into the English language, means Councillor of State; and that, by reason thereof, by the laws then,
*and at that time, and still in force in the kingdom of [*321]
Spain, the said alleged agreement was and is null and void, and the parties to any such agreement as the said alleged agreement in the said bill mentioned, would have been and were, and still would be and are, by reason of the premises aforesaid, by the laws of the said kingdom of Spain, liable to pains and penalties and criminal prosecutions for making and entering into such alleged agreement: And this defendant doth aver that the said alleged agreement, if any, was made and entered into in the said kingdom of Spain, and that, at and prior to the date and making of the said alleged agreement, this defendant and the said Don Pio de Elizalde, were, respectively, subjects of and residing and domiciled in the said kingdom of Spain, and under the allegiance of the said Spanish government; and the said Don Pio de Elizalde being, as aforesaid, a public officer and agent of the said Spanish government, and holding, as such, an office or offices of trust and confidence under the same govern-

ment as aforesaid, the said alleged agreement was and is, by reason thereof, by the said laws then and still in force in the said kingdom of Spain, *ipso facto* null and void, and the making and entering into such alleged agreement was and is, by reason of the premises aforesaid, a crime against the laws of the said kingdom of Spain, subjecting the parties thereto to pains and penalties, and a criminal prosecution for the same: and, therefore, this defendant humbly demands the judgment of this Honorable Court whether, &c."

Mr. *Wakefield*, Mr. *Jacob* and Mr. *Rogers*, in support of the plea, said that the courts of this kingdom would not enforce an agreement between parties who were subjects of and [*322] resident in a foreign country, *which, as the plea averred, was null and void by the laws of that country, and subjected the parties to pains and penalties and to a criminal prosecution. *Armstrong* v. *Armstrong*;(a) *Thomson* v. *Thomson*,(b) *De la Vega* v. *Vianna*;(c) 3 Burge on Colonial Law, 757, 759 and 760: Story on the Conflict of Laws, 200: *Talleyrand* v. *Boulanger*.(d)

Mr. *Knight Bruce* and Mr. *Koe*, in support of the bill:—The plea that has been put in in this case, is, in fact, two distinct pleas formed into one. It is a plea to the discovery, on the ground that it would subject the defendant to pains and penalties; and to the discovery and relief, on the ground that the contract is illegal. A plaintiff may be entitled to relief, although he may not be entitled to compel an answer to a single allegation in his bill; for he may prove his case without the oath of the defendant. In *Brownsword* v. *Edwards*,(e) Lord Hardwicke, C., says: "Some collateral arguments have been used, that it is not in every case the party shall protect himself against relief in this Court, upon an allegation that it will subject him to a supposed crime. It is true, it never creates a defence against relief in this

(a) 3 Myl. & Keen, 45.
(b) 7 Ves. 470, 473.
(c) 1 Barn. & Adol. 284.
(d) 3 Ves. 447.
(e) 2 Ves. 246.

Court; therefore, in case of usury or forgery, if a proof can be made of it, the Court will let the cause go on still to a hearing, but will not force the party, by his own oath, to subject himself to punishment for it. In a bill to inquire into the reality of deeds on suggestion of forgery, the Court has entertained jurisdiction of the cause; though it does not oblige the party to *a discovery, but directs an issue to try whether forged." [*323] It is manifest therefore that a plea to the discovery, on the ground that it would subject the defendant to pains and penalties, is quite distinct from a plea to relief. The plea avers that the contract is invalid, and, besides, that the entering into it subjects the parties to pains and penalties: so that it does not aver that the invalidity of the contract creates its criminality, or that its criminality creates its invalidity. Criminality and invalidity are by no means one and the same thing; nor, indeed, is the one the necessary consequence of the other. An act may be invalid, and yet not criminal: or it may be criminal, and yet not invalid. *Fieri non debet; sed factum valet*, is a maxim acknowledged by our law. A marriage may be valid, although some of the regulations prescribed by law, may not have been complied with. If then, as we contend, criminality and invalidity are not necessarily connected with or deducible from each other, the plea must fail for duplicity.

Secondly: the plea is too loose and vague. It ought to have set forth the particular law of Spain, which renders the contract invalid. Is it fair that the plaintiff should be sent to search all the laws of Spain, in order to find out which of those laws it is that the plea alludes to? Suppose that the defendant had pleaded that, by the laws of this kingdom, the contract was void: that general mode of pleading would not have been good. The particular Act of Parliament which makes the contract void, must be referred to. A private Act of Parliament is as much the law of this country as a public Act is; but, nevertheless, it must be specially pleaded. The judges of this country are bound to know its laws; but they are not bound to know the laws of a foreign country.

[*324] *Thirdly: Elizalde is dead; and, consequently, he cannot be subject to a criminal prosecution, or to pains and penalties.

Fourthly: there is no averment connecting the agreement stated in the letter of June, 1828, with the agreement stated at the outset of the bill: there is nothing to show that they are identical: consequently, it is left uncertain to which of the two agreements the plea is addressed.

Fifthly: the bill contains a variety of recognitions of the agreement and promises to perform it, both written and verbal, which were made by the defendant, in France and England, as well as in Spain, and before as well as since Elizalde's death: and the bill is as much founded on those recognitions and promises, as it is upon the original agreement. The plea, however, no where avers that the plaintiffs have no present right to sue. Suppose that parties enter into an agreement which is illegal, and one of them gains a large sum of money, and, the money having been realized, promises to pay, to the other party, the share to which he would have been entitled if the agreement had been valid: is it at all clear that, by the law of Spain or by the law of this country, that promise could not be enforced? *Barnes* v. *Hedley*.(*a*) In this case there is nothing to show that the original agreement, though invalid by the laws of Spain, may not form a good consideration for the subsequently recognized contract, when the parties were not resident in that country.

THE VICE-CHANCELLOR:—The bill, in effect, represents but one agreement.

[*325] *The whole agreement made was that there should be a participation, in the profits of the contract with the Spanish government, by the party whom the plaintiffs represent, to the extent of one-fifteenth. The letter of June, 1828, which was relied on by the counsel in support of the bill, did not create a new agreement, but was merely an acknowledgment of the prior verbal contract. It is evidence of that contract, but

(*a*) 2 Taunt. 184.

nothing more. I have read all the subsequent letters; but my opinion is that they do not show any promise to account, independently of any obligation which might arise out of the original agreement. The consequence is that the bill does not represent, as it has been said to do, that there were two agreements.

The plea, which is to the whole bill, alleges that, for the reason which it assigns, the agreement in question was null and void by the laws of Spain: and then it makes an averment, in support of the plea, that the making and entering into such agreement, was a crime against the laws of Spain, subjecting the parties to it to pains and penalties, and to a criminal prosecution. I see nothing in that averment to vitiate the plea. And, if the fact should turn out as the plea represents, then there must be an end of the plaintiffs' case.

Plea allowed with costs. The costs of the suit reserved; the plaintiffs having undertaken to reply.(*a*)

(*a*) See *Fry* v. *Richardson*, ante, Vol. X. p. 475.

1840.—Preston v. Grand Collier Dock Company.

[*327] *PRESTON *v.* THE GRAND COLLIER DOCK COMPANY AND OTHERS.(*a*)

1840: 7th, 8th, 10th, and 21st December.

A bill by a member of a numerous incorporated Company, on behalf of himself and all the other members except the defendants, praying that a transaction in which the defendants had been the actors, but which had been sanctioned, unanimously, at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members on whose behalf the bill was filed, had been present and voted at the meeting.[1]

Pending a bill in Parliament for forming a dock company, certain subscribers to the undertaking, subscribed for 9,000 additional shares, in order to make up the amount of capital required by the standing orders of the House of Lords, before the bill could pass that House. Afterwards, but before the bill was passed, those persons signed a declaration that they held the additional shares in trust for the Company. After the bill had passed, a meeting of the Company resolved unanimously that the trust should be annulled and the shares be transferred to the secretary, for the use of the Company: no transfer, however, was made. The directors having made calls, it was held that the subscribers for the additional shares were bound, as trustees, to pay the calls in respect of those shares.

THE plaintiff, D. Preston, was an original subscriber for 20 shares in the Company. The bill was filed, by him, on [*328] behalf of himself and all other the subscribers *to and members of the Company except the defendants. The defendants were the company, John Guyon, William Gunston, William John Richardson, Henry Luard, Joseph Horatio Ritchie, James Heygate, Charles Duncan, Samuel Saunderson Hall, John Walter Hulme, Sir William Heygate, bart., John Smith, Susan Gordon, widow, and Rowland Nevett Bennett.

(*a*) See *Mangles* v. *The Grand Collier Dock Company*, reported ante, Vol. X. p. 519.

(1) A shareholder in a trading company, who possessed both original and preferential shares, filed a bill on behalf of himself and all the other shareholders, except the defendant, complaining of acts done by the directors and other defendants injurious to the interest of the company. A demurrer, on part of the company, for want of equity, was allowed upon the ground that an individual shareholder was not entitled to be plaintiff in a suit of such a nature, and that the interest of the original and preferential shareholders were not so identical as to admit such a bill being filed on behalf of both set of shareholders. *Lad* v. *The Copper Miner's Co.*, 1 Hall & Twells, 85.

1840.—Preston v. Grand Collier Dock Company.

Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate, Duncan, Hall and Hulme, were the persons who subscribed for 9,000 of the additional shares in the Company (but none of which were registered,) towards making up the amount of capital required, by the standing orders of the House of Lords, to be subscribed before the bill for forming the Company could be brought into that House. All those nine persons, except Hall, were directors of the Company; and Hall had been a director. Sir W. Heygate was the only other director. Smith was the secretary of the Company. Susan Gordon and Bennett were the personal representatives of Adam Gordon, deceased, who was the party to the Parliamentary deed of the first part, and with whom the covenants contained in that deed were entered into.

The bill set forth, as in *Mangles* v. *The Grand Collier Dock Company*, the Parliamentary deed, the deed of management, the making of the additional subscriptions, the purpose for which those subscriptions were made, the Act of Parliament, the memorandum of the 4th of July, 1837, and the resolution passed at the meeting of the Company on the 27th of June, 1839. It stated also that Guyon, Gunston, Luard, Richardson, Ritchie and Hall, and fourteen other members of the Company (who were named,) voted, either in person or *by proxy, [*329] at that meeting, and that the resolution was carried unanimously. The bill further stated that it was alleged, by or on behalf of the defendants, that Gunston, Hall, Richardson, Ritchie, Luard, Guyon, Duncan and James Heygate, affixed their names or initials to the memorandum of the 4th July, 1837; and that Hulme affixed his name or initials to a memorandum, in all respects similar to it, which was dated the 5th of the same month: that the alleged memorandum of the 4th of July, 1837, and the resolution to annul the trust thereby alleged to be created, and the direction to transfer the additional shares to Smith, the secretary, were not warranted by the Act of Parliament, and were made, by collusion between the parties who had subscribed for the additional shares and such of the directors as were present at the meeting of the 27th of June, 1839, for the fraudulent pur-

pose of relieving Gunston, Richardson, Ritchie, Luard, James Heygate, Guyon, Duncan and Hall, from their liability to pay the deposit of 1*l.* per share on their additional shares, and the calls then contemplated to be made upon the subscribers to and proprietors of the undertaking: that the said memorandum and resolution tended to defraud and deprive the other shareholders of the benefit of the subscriptions for the additional shares, and of the deposit of 1*l.* per share, and the calls which might be made upon the subscribers to and proprietors of shares in the undertaking or Company: that, pursuant to such resolution, an entry was made, in the register-book or share-ledger of the Company, purporting that the additional shares of the last-named parties had been transferred to and then stood in the name of John Smith, in trust for the Company; but no actual transfer of such shares was then made to Smith: that some fraudulent [*330] agreement was made, between Hulme *and the directors, in respect of the additional shares subscribed for by him, and that, pursuant thereto, an entry was made, in the register-book or share-ledger of the Company, that Hulme held his additional shares in trust for the Company: that a meeting of the directors was held on the 22d of July, 1839, at which time only 605 shares had been duly registered; and it was then resolved that a call of 5*l.* per share should be made on the registered proprietors, and paid on or before the 21st of August then next: that the plaintiff paid that call on his shares, on or about the 21st of August, and that it had been paid on all or nearly all the rest of the 605 shares: that, at another meeting of the directors, held on the 28th of October, 1839, a further call of 2*l.* per share was resolved upon, and that call also had been paid, by the plaintiff and all or nearly all the other holders of the 605 shares: that the plaintiff was ignorant of the frauds aforesaid until long after he had paid the calls; and that he, and all the other shareholders except the defendants, paid those calls in the full faith and confidence that all the shares subscribed for, in and by the Parliamentary deed, were *bona fide* subscribed for, and that the calls either had been or would be paid on them; but he had since discovered that neither those calls nor the required deposit

of 1*l.* per share, had been paid on the 9,000 additional shares subscribed for by the defendants: that, unless those payments on the last-mentioned shares were enforced, it would be impossible to carry the objects for which the Company was formed, into effect: that the plaintiff had requested the Company and the other defendants who were directors of the Company, to compel the payment of the deposit and calls on the additional shares, and to have those shares duly entered and registered in the names of the persons by whom

*the same were originally subscribed for in the Parliamentary deed; and had requested such persons to consent to those shares being so entered and registered, and to take the usual certificates thereof, and to expunge the resolutions which had been come to in respect thereof; and also had requested Susan Gordon, and Bennett, to enforce the covenants entered into, by the defendants, the subscribers for the additional shares, in, and by the Parliamentary deed, with Adam Gordon, his executors, or administrators; but they had refused to comply with such requests: that the defendants, the directors, in order to give effect to the frauds before complained of, and to secure the indemnity of themselves and Hall, against the same, and the consequences thereof, threatened to declare, or join in declaring the additional shares to be forfeited: that, if the defendants, the subscribers for the additional shares, did, as they pretended, execute the Parliamentary deed, and subscribe for those shares, as a mere matter of form, and in order to satisfy the standing order of the House of Lords, they ought to be held to such subscriptions; as, otherwise, the same would be a fraud on the House of Lords, and on the other shareholders: that the before-mentioned memorandums, and resolutions relating to the additional shares, were also fraudulent; and, if those shares were to be considered as held in trust for the Company, it would be impossible to carry the objects for which the Company was formed into effect, and all the meetings of the Company which had been held, and all the business done thereat, would be invalid, inasmuch as no such meeting had been attended by 10 or more members, (either in person or by proxy,) [*331]

holding 1,000 shares, exclusive of the additional shares: that the subscribers for the additional shares had, in and ever since 1837, combined and colluded together for the purpose [*332] of practising and effecting *the several fraudulent transactions aforesaid, and that those transactions were planned and transacted with the privity and assistance of Sir W. Heygate; and that the subscribers for the additional shares had a common and joint interest in practising and maintaining the fraud, and jointly and severally claimed some interest in, or title to such shares; and they and Sir W. Heygate knew of and joined in the attempt to exonerate the subscribers for them from all liability in respect thereof, and from payment of the deposit and calls thereon: that the defendants pretended that the plaintiff had not paid the call of 2*l.* per share on his shares, and, therefore, under the provisions of the Act of Parliament, his shares had been forfeited, and, consequently, he no longer had any interest in the undertaking: but the plaintiff charged that, on the 3d of June, 1840, he paid the amount of the call to the bankers of the Company, as directed by the advertisement for the call, together with interest at 5*l.* per cent., from the day on which the call was first payable, and, on the following day, he gave notice of such payment to the Company; but the Company, although they had received the sum so paid, had not offered to return it to the plaintiff, as, he submitted, they ought to have done if his shares had become forfeited before the payment was made; and that, after such payment, the Company could not legally proceed to declare his shares to be forfeited: that the defendants pretended that, before the payment was made, the directors had passed a resolution declaring the plaintiff's shares to be forfeited; but the plaintiff charged that, if any such resolution had been made, no notice of it had been given to him, nor had it been confirmed at a general meeting of the shareholders; both of which acts were required to be done, by the Act of Parliament, before a share could [*333] *become forfeited; and therefore, he was and ought to stand as the proprietor of 20 shares: that the members of the Company, who were not parties to the bill, were

upwards of 100 in number, and many of them were unknown to the plaintiff, and it was impossible for him to make all of them parties thereto.

The bill prayed that it might be declared that Guyon, Gunston, Richardson, Luard, Ritchie. James Heygate, Duncan, Hall, and Hulme were *bona fide*, or that, under the circumstances aforesaid, they ought to be considered and treated as *bona fide* subscribers to the undertaking in respect of all the shares for which they respectively subscribed the Parliamentary deed, and to be bound thereby; and that they ought to perform the covenants and agreements thereby entered into by them; and that the memorandums of the 4th and 5th of July, 1837,(*a*) and all the acts, deeds, resolutions, and entries by which it had been attempted to give effect to those memorandums or the trust thereby attempted to be created, might be declared to be illegal, fraudulent and void; and that the shares to which those memorandums related, might (if any transfer thereof had been made) be re-transferred into the names of the last-named defendants, in the proportions in which such shares were subscribed for by them respectively in the Parliamentary deed; and that the same defendants might be decreed to pay, to the Company, the deposit of 1*l.* per share and the amount of the two calls of 5*l.* and 2*l.* per share on their additional shares respectively, with interest *at 5*l.* per cent. from the time when the same [*334] ought to have been paid; and that the Company and the directors thereof might be decreed to treat the additional shares as *bona fide* belonging to the same defendants, in the proportion of 1,000 shares each, according to their original subscriptions for the same; and might be decreed to enforce against them the payment of the said deposit and calls, and of all future calls; and that the Company and the directors might be restrained from making any other calls, on the proprietors, until the defendants

(*a*) These were memorandums signed by the purchasers of the additional shares, declaring that those shares were to be held in trust for the Company. The memorandum of the 4th of July was signed by all of them, except Hulme, and the memorandum of the 5th was signed by him alone.

should have paid the amount of the deposit and calls already made, on their additional shares; and that the covenants of the Parliamentary deed might be put in force against the same defendants; and that the Company and the directors might be restrained from declaring the additional shares to be forfeited; and that all the defendants, except the Company and Susan Gordon, Bennett and Smith, might be decreed to indemnify the Company, and, in particular, the plaintiff and the other persons on whose behalf the bill was filed, from all loss or damage arising from the matters or transactions aforesaid; and that Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate, Duncan, Hall, Hulme and Sir William Heygate might be decreed to pay the costs of the suit; and that the Company and the directors might be restrained from taking any further steps to declare or procure the forfeiture of the plaintiff's shares, on the ground of the non-payment of either of the calls which had been made, or on account of any other matter or thing then passed or happened.

Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate and Duncan demurred, to the bill, for want of equity, and because all the members or proprietors of *or subscribers to the Company, ought to have been made parties to the bill. [*334]

Hall demurred, separately, on the same grounds.

Mr. *Jacob*, Mr. *James Russell*, and Mr. *Heathfield*, in support of the first demurrer.

The matters which are made the subject of complaint in the bill, are not cognizable by the Court of Chancery. The Court of King's Bench alone has jurisdiction to decide questions relating to the affairs of a corporation.

Guyon, Gunston, Richardson, Hall, Duncan and Ritchie were members of the committee appointed by the deed of management; and, by that deed, the committee was authorized to adopt all measures which it might consider necessary or expedient for obtaining the Act of Parliament: therefore the members had a right,

as against the Company, to make the subscriptions which are alleged, or rather, pretended to be colorable.

The resolution for annulling the trust as to the additional shares, was passed at a meeting of the Company held on the 27th of June, 1839; and that resolution is alleged, in general terms, to be fraudulent; but there is no statement of any species of fraud consisting of mis-representation or suppression. Did the members present, (who voted unanimously,) conspire to defraud one another? It is also alleged that the memorandums and resolution tended to deprive the other shareholders of the benefit of the deposit and calls on the additional shares. But neither the deeds nor the Act of Parliament require that any deposit should be paid; nor was any *call made [*336] upon the shareholders in June, 1839. The first call was in July of that year. Consequently, when the demurring defendants transferred their additional shares to the secretary, they were under no liability whatever in respect of those shares; and it is nowhere alleged that they had executed the Parliamentary deed in respect of them.(a) The defendants having purchased their additional shares in trust for the Company, it was right for them to take the sense of the Company at large as to the disposal of them; and the Company resolved, unanimously, that the shares should be transferred to the secretary. Why is not such a transfer to indemnify these parties, just as effectually as a transfer to any other individual? How can such a transaction be justly called fraudulent? The truth is that the plaintiff, who was absent from the meeting, disapproves of what took place at it; and, if this bill is sustained, every vote of a corporate body which any member disapproves of, may be made the subject of a suit.

Next, the bill is erroneously framed; for it is filed, by the Plaintiff, on behalf of himself and all the other members of the Company, except the defendants; not on behalf of the plaintiff and all the other members, except the defendants, who should

(a) There was no *express* allegation to that effect; but the bill *assumed* that the subscribers had executed the Parliamentary deed in respect of the additional shares.

come in and seek relief by and contribute to the expenses of the suit: and, therefore, it is necessary that all the members who are not expressly named as parties, should have a common interest. Now the bill states that, besides the demurring defendants, 14 other members of the Company (two of whom [*337] were then directors) were present at the *meeting of the 27th of June, 1839, at which the alleged fraud was consummated; and it states also that the resolution which was passed at that meeting, was carried unanimously; so that the plaintiff who, it is true, did not attend that meeting, is suing on behalf of two directors and 12 other members of the Company, to be relieved from a fraud in which they were concerned; or, in other words, the object of this bill is to relieve fraudulent parties from the consequences of their own fraud. There is no averment that they were deceived or the victims of the fraud. The bill, therefore, in that respect, is entirely erroneous; for the plaintiff is suing on behalf of persons with whom he has no common right or interest, for none of the members who concurred in the resolution, could sustain this bill. Lastly: the concluding part of the prayer relates, exclusively, to the plaintiff's own private concerns, in which the other shareholders not only have no common interest with him, but have an interest adverse to his: consequently, all the other members of the Company ought to have been made parties to the suit. *Long* v. *Yonge*;(a) *Van Sandau* v. *Moore*;(b) *Jones* v. *Garcia del Rio*.(c)

Mr. *Craig*, for the defendant Hall, said that the plaintiff, by his bill, had asked relief, as to which he had not got the proper parties before the Court; and that it was nowhere alleged that the parties who took the additional shares, had executed the Parliamentary deed in respect of those shares.

Mr. *Knight Bruce*, Mr. *Wakefield*, and Mr. *Loval*, in support of the bill:—It has been said that all the members of the

(a) Ante, Vol. II. p. 369.
(b) 1 Russ. 441.
(c) Turn. & Russ. 297.

Company, *ought to have been made parties to the record; but a sufficient reason is assigned for not making them all parties; for the bill charges that the several members and subscribers to the Company, not parties thereto, are very numerous, being upwards of 100 in number, and are, many of them, unknown to the plaintiff: and that it is impossible for the plaintiff to make them all parties. [*338]

It has been said also that the other members of the Company have not a common interest in the subject matter of the suit: but the bill prays that it may be declared that the defendants Guyon, Gunston, &c., were *bona fide*, or that, under the circumstances aforesaid, they ought to be considered and treated as *bona fide* subscribers, to the undertaking, in respect of all the shares for which they respectively subscribed the Parliamentary deed, and bound thereby, and that they ought to perform and fulfil the covenants and agreements thereby respectively entered into by them; and that the memorandums of the 4th and 5th of July, 1837, and all the acts, deeds, resolutions and entries by which it was attempted to give effect to them or to the trusts thereby attempted to be created, may be declared to be illegal, fraudulent and void, &c. There is, therefore, an object in which all the members have a common interest, namely, to add to the liabilities of the shareholders, and to increase the funds of the Company. *Cockburn* v. *Thompson*;(a) *Adair* v. *The New River Company*.(b) The ground on which *Long* v. *Yonge* and *Van Sandau* v. *Moore* were decided, was that a dissolution of the partnerships was prayed. In the latter of those cases the Lord Chancellor says: "The bill proceeds on two grounds, &c."(c) In *Hichens* v. *Congreve* (d) the *Lord Chancellor says: "Here is a fund in which all the shareholders are interested. Fifteen thousand pounds has been improperly taken out of it; a fraud has been committed on them all. Is it necessary that all should come into a court of justice for the purpose of joining in a suit with a view to obtain redress? It [*339]

(a) 16 Ves. 321. (b) 11 Ves. 429. (c) 1 Russ. 463.
(d) 4 Russ. 575, 576; S. C. ante, Vol. IV. p. 420.

is possible that the number of shareholders may be 6,000; for the capital of the Company is fixed, by the Act of Parliament, at 300,000*l.* divided into shares of 50*l.* each; and justice never could be obtained if any very great number of plaintiffs were put on the record. It is said that there is nothing, on the face of the bill, which shows that the shareholders are so numerous that they could not all be joined as parties, without inconvenience. I think it does appear sufficiently that, if all were joined, the number of complainants would be inconveniently great. First, because the shares are 6,000 in number, and, secondly, because it appears, by the Act of Parliament, that there were then upwards of 200 shareholders. It is clear, therefore, that justice would be unattainable, if all the shareholders were required to be parties to the suit." The question here is, whether the funds of the Company are to receive a certain sum of money: of what avail is it then to say that some of the shareholders have acceded to the transaction which the bill complains of and seeks to set aside as being fraudulent? If any of the defendants who are sought to be made liable by this suit, have an equity to compel any of the other shareholders to make good what they may be called on to contribute, that must be made the subject of another suit. The plaintiff on this record, represents the general right; and his suing on behalf of all the other shareholders, is merely a mode of expressing that he sues in the general right.

[*340] The case of *Bromley* v. *Smith*,(*a*) is *strictly analogous to the present. There a few of the inhabitants of a parish filed a bill, on behalf of themselves and the rest of the parishioners, for relief against acts which were alleged to be injurious to their common right. The defendants stated, in their answers, that the majority of the parishioners were averse to the institution of the suit, and approved of the acts complained of in the bill. But Sir John Leach, V. C., said that, where a matter was necessarily injurious to the common right, the majority of the persons interested could neither excuse the wrong nor deprive all other parties of their remedy by suit. Besides, this

(*a*) Ante, Vol. I. p. 8.

is a case of fraud; and it was decided, in *Seddon* v. *Connell*, that, where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that all the persons who were parties to the fraud, should be made parties to the record.(*a*)

Another objection that was made to the bill, was that part of the relief sought by it, related to the plaintiff's own private concerns, in which the other members of the company had no interest, that is to say, that it prayed for an injunction to restrain the Company and the directors from taking any further steps to declare the forfeiture of the plaintiff's 20 shares. But the attempted forfeiture of those shares is a matter inseparably blended with the general fraud, and, consequently, the plaintiff has a right to introduce it into a suit relating to that general fraud. Is it to be endured that the defendants should conspire to defeat the plaintiff's title? He is, to a great extent, a trustee of the suit for the benefit of all the shareholders: and it is not only the right but the duty of a trustee to prevent *his [*341] legal title from being fraudulently affected, so as to prejudice his *cestuis que trust*.

The bill contains specific charges of fraud and collusion: of fraud committed not only upon the Legislature, but also upon every person who has embarked his money in the undertaking. The main object of the bill, is to redress that fraud, and to have the additional shares treated as belonging to the parties to whom they were represented to belong.

Mr. *Wakefield* cited *Campbell* v. *Mackay*.(*b*)

Mr. *Jacob*, in reply:—*Bromley* v. *Smith* has no bearing on the present case. The bill was not filed by or on behalf of parties seeking to be relieved from their own acts, or from acts in which they had concurred. All that was stated in that case, was that some of the persons on whose behalf the bill was filed, approved

(*a*) Ante, Vol. X. p. 79.
(*b*) 1 Myl. & Craig. 603; and ante, Vol. VII. p. 564.

of the acts complained of, and were averse to the institution of the suit. Here the bill is filed to be relieved from a fraud, on behalf of certain persons who were guilty of that fraud. If all the members except one had concurred in the fraud, could that one have filed a bill on behalf of himself and the other members, to be relieved from the fraud?

Besides, no case can be produced in which a court of equity has relieved an incorporated company against its own acts. Acts done at the general meetings of the Company, are the acts of the Company, and must, necessarily, be conclusive upon every member of it.

[*342] *THE VICE-CHANCELLOR:—I do not see that the bill anywhere states that any of the gentlemen who subscribed for the additional shares, subscribed the Parliamentary deed in respect of those shares.(*a*) I make that observation, because it strikes me that the Act of Parliament speaks of subscription generally, and not of any particular mode of subscription. Therefore, anything which, in fact, would be a subscription, would come within the words of the Act of Parliament.(*b*)

Is there anything, in the Act, which prohibits a person from being a shareholder and holding his share in trust for another person?

Mr. *Jacob*.—No, Sir.

THE VICE-CHANCELLOR:—Before I decide this point I shall certainly read over, very particularly, the Act of Parliament as well as every one of the allegations in the bill; because it strikes me that the real object of the bill is to give a sort of validity to that rule of the House of Lords for the enforcement of which, as I understand it at present, the Act of Parliament has made no provision. It seems to me that it was contemplated by the framer of this bill, that, whereas the House of Lords requires that, before the bill in Parliament should pass their Lorships'

(*a*) The fact was assumed as before-mentioned.

(*b*) See the action alluded to, ante, Vol. X. p. 522.

House, three-fourths at least of the number of the shares should be subscribed for, it would be a sort of fraud, on that rule, if the subscriptions for the three-fourths of the shares were made *in such a manner as would not, permanently and [*343] for all purposes whatever, make those who had become subscribers for those shares, holders of them, so that they could not get rid of them; but must, at all events, be made liable to pay the amount of their subscriptions. Now it is a very remarkable thing that there should be such a rule in the House of Lords, and that there should be no such rule in the House of Commons. Possibly there may be no such rule in the House of Commons, because the Members of that House may consider that the rule would be inoperative, unless clauses were introduced into the Act of Parliament, to give it operation; and, therefore, it may be that, though their Lordships may think it right there should be such a rule in their House, the House of Commons may think it is not right that there should be such a rule in their House: and the House of Commons may have thought that the object which is aimed at, by their Lordships' rule, might be effectually secured by introducing clauses into the Act of Parliament. But the act has passed without any such clause: so that it appears that the legislature, collectively, did not think it right there should be any such clause, in the bill, as might give such an effect to the rule of the House of Lords, as that which the framer of this bill supposed ought to be given to it. And it is with reference to that consideration that I think I must, very particularly, examine this Act of Parliament, and see how far that which has been done, has been legally done because, if it has been legally done within the purview of the Act of Parliament, although to a certain extent the object of the House of Lords has not been carried into effect, this only would follow, namely, that the object of their Lordships' rule had not been attained, because their *Lordships had not so framed [*344] the Act, as to give effect to their rule.

21*st December*.—THE VICE-CHANCELLOR:—In this case there are two demurrers; one by Mr. Samuel Saunderson Hall, and

the other by seven of those nine persons who were parties to transactions which are termed fraudulent in the bill.

Now the cases of the demurring parties differ in this respect, that Mr. Hall is said not to be a director, and, therefore, the same relief cannot be administered as against him as can be against the seven. But it appears to me that, as to the seven, in respect of their being directors, relief certainly can be administered; I mean that relief which is asked, that they may be restrained from taking any further or other steps to declare or procure the forfeiture of the plaintiff's 20 shares.

It appears that there was a deposit of 1*l.* paid; and a call was subsequently made, by the directors, for 5*l.* per share; and that was paid. Then another call was made, in October, 1839, for 2*l.* per share; and that call was paid to the bankers of the Company: and though it is true that, under the Act of Parliament, in case a call on a share had not been paid, the directors might proceed to declare the share to be forfeited; yet in a case where, before any declaration of forfeiture is made, the whole amount of what was due in respect of the call has been paid, and where, as this bill states, no offer has been made to repay the amount, this Court would not allow the directors to proceed to declare the share forfeited; because it is contrary to common equity *and to plain sense and justice that the parties should receive and keep in their possession the amount of the call, and, after that, proceed to declare the share to be forfeited. I think, therefore, that, if there was nothing else in the case, the demurrer of the seven defendants must be overruled.

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But, inasmuch as the case of Mr. Hall stands distinguished from the case of the other defendants who have demurred, I have got to consider, with respect to him, what will also apply to them, namely, the general equity of the case.

I must preface what I have to say on that subject by observing that the word fraud is a term, which, in fairness, is hardly applicable to the transactions in question: and I must also observe that there is a little difficulty, upon the face of this bill, in determining the fact whether there was such memorandums

as are mentioned of the 4th and 5th of July, 1837. It is stated in the first instance, that it is alleged that there were such papers; which is no allegation of their existence. Then it is alleged that the defendants pretend that there were such papers; and the contrary of that pretence is charged to be true. I observe, however, that the bill states that the memorandums were fraudulent, and that they were made and entered into for a fraudulent purpose. Now they could not have been fraudulent or have been made and entered into for any purpose, unless they had been made. They must have existed to have had any character at all: and moreover, the bill prays that the two memorandums, dated respectively the 4th and 5th of July, 1837, and all the acts, &c., by which it had been attempted to give effect to them or to the trust thereby attempted to be created, might be declared to be *illegal, fraudulent and void; [*346] which they cannot be, unless they exist.

I take it then as a fact which is represented on this bill, with sufficient plainness, that, for the purpose of enabling the bill for forming the Company to pass through the House of Lords, the nine gentlemen did procure further subscriptions to the amount of 9,000 shares; of which each of those nine gentlemen took 1,000 shares. Whether they subscribed the Parliamentary deed or not, is quite immaterial. They became the subscribers for the shares; and, admitting that they did take the shares in trust for the Company, what then? they were the owners of the shares; and, if they were trustees for the Company, they were liable still, by the very provisions of the act, to all those operations which were to be performed, by virtue of the act, by those who held shares; and though they might, like all other trustees, have a right to be reimbursed, by their *cestuis que trust*, all expenses they incurred in the execution of their trusteeship, they were primarily liable. It is quite impossible to read this Act of Parliament without seeing that it was the intention of the legislature that those who became shareholders should, all of them, pay rateably.

Then what was done? The parties do not seem to me to have managed their case in the way in which it ought to have

been. As I understand the case, even at this day, there has been no transfer of those shares by those nine subscribers. The consequence of which is that, let them state what they please with respect to an acknowledgment of the trust, and with respect to an intention to exonerate them from any liability as trustees, under the provisions of the Act they were
[*347] clearly *liable, when calls were made by the directors on other shareholders, to have calls made upon them. For this Court never would allow the directors of a company so to proceed as to require some shareholders to pay a deposit and calls, and not to require others to make similar payments. It is quite obvious to me that no fraud was intended; and that the thing really meant was a benefit to all the subscribers, namely, that the subscribers should get the Act of Parliament they wished for. But, nevertheless, as that purpose was accomplished by these nine gentlemen becoming shareholders of 1,000 shares each, my opinion is that that there has been an error which this Court will set right, namely, that, when the directors thought proper to make the calls as they did, they stopped short of that which was their duty, and that they ought to have gone on to direct the same sums to be paid upon each of those shares as had been directed to be paid upon the other shares which were held by those who were called the registered shareholders. Therefore it is evident that, in whatever manner it is to be done, this Court will rectify the error that has been made, and will take care that all the shareholders shall be put upon the same footing with respect to the liability to pay calls.

My opinion, therefore, is that there is a plain equity for the plaintiff to be relieved; and, on that ground, the demurrers must be overruled.

My opinion also is that the bill could not have been constructed otherwise than as it is; and that the objection made for want of parties, is answered upon the face of the bill. For the bill avers that there are upwards of 100 other members of the Company, and that it would be impossible to make all
[*348] of them parties. Therefore, *according to the decisions which have been made on the point, that objec-

tion cannot prevail: and the consequence is that, on both grounds, the demurrers must be overruled.

LISTER *v.* PAYN.

1840: 1st December.

A ship at sea was mortgaged, by the owner, to the plaintiff. The ship having become unseaworthy, it was condemned and sold in a foreign port. The purchaser drew, upon a person in England, a bill of exchange for the proceeds, and indorsed and delivered it to the captain. The captain claimed a lien upon, or a right of set-off against the amount of the bill, for disbursements which he had made on account of the ship, and threatened to bring an action against the acceptor, for the money due on the bill. The Court granted an injunction to restrain the action.

A mortgage of a ship is good as between the mortgagor and mortgagee, although the particulars of the mortgage are not indorsed on the certificate of registry, as required by 3 & 4 Will. 4, c. 55.

ON the 10th of March, 1837, James Waddle, a merchant in London, mortgaged a ship, of which he was owner, to a joint stock bank at Liverpool, for securing 6,000*l.* due from him to the bank. On the same day, the mortgage was duly registered; but, the ship being then at sea, the particulars of the mortgage were not indorsed on the certificate of her registry, nor was such indorsement made afterwards; although the ship returned to England in August, 1838.(*a*) Waddle, after the ship's return, sent her on a voyage to Calcutta, where she arrived safely; and, afterwards, having obtained a cargo, she set sail for England. On her homeward voyage she encountered severe weather, and sustained considerable damage; in consequence of which she put into the Mauritius, where she was condemned *as unseaworthy, and sold; and her [*349] cargo was sent home in another vessel. The net proceeds of the sale of the ship, amounted to 957*l.*: and the purchasers drew upon the defendant Dunbar, who was a resident

(*a*) See 3 & 4 Will. 4, c. 55 (for the registering of British vessels,) sect. 34. See also sects. 32, 33, 35, 36, 42, & 43.

in England, a bill of exchange for that sum, and indorsed and delivered it to the defendant Payn, the captain.

On the 23d of November, 1839, a fiat in bankruptcy issued against Waddle, under which he was declared a bankrupt.

Payn arrived in England, in March, 1840; and, being about to bring an action against Dunbar for the amount of the bill of exchange, the bill in this cause was filed by the bank, in the name of one of their public officers, against him, Dunbar and Waddle's assignees, for an injunction to restrain an action. Payn, by his answer, claimed a lien, on the amount of the bill of exchange, for disbursements which he had made on account of the ship, at and during her voyage to Calcutta.

A motion was now made for the injunction.

Mr. *Knight Bruce* and Mr. *Rolt*, in support of the motion, said that notwithstanding the particulars of the mortgage were not indorsed on the certificate of the ship's registry, yet the mortgage was good as between the mortgagor and the mortgagee; for the 35th sect. of 3 & 4 W. 4, c. 55, enacted that, so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, should have been entered in the book of registry as thereinbefore [*350] directed, the said bill of sale or other instrument *should be valid and effectual to pass the property thereby intended to be transferred, as against all persons and to all intents and purposes, except such subsequent purchasers and mortgagees who should first procure the indorsement to be made on the certificate of registry; that the lien claimed by Payn was for ordinary disbursements on account of the ship; but the captain of a vessel had no lien on it, even for necessary repairs, although, if the repairs were made abroad, he might hypothecate the vessel for the expense incurred; *Hussey* v. *Christie*;(a) much less had he any lien for ordinary disbursements on account of the vessel.

Mr. *Jacob* and Mr. *Anderdon*, for the defendant, Payn, said that,

(a) 13 Ves. 594; and 9 East, 426.

although the captain of a vessel might have no lien on it for ordinary disbursements, yet if it was sold, he had a right to set off the amount of such disbursements against the proceeds of the sale: that a solicitor had no lien, for his bill of costs, upon his client's freehold estate; but, if the estate was sold, and the purchase-money was received by the solicitor, he would have a right to set off the amount of his bill against it; that although the particulars of the mortgage could not be indorsed on the certificate of registry at the time when the mortgage was made, owing to the ship being then at sea; yet the indorsement might have been made on her return to this country, in August, 1838: that no notice of the mortgage was given to Payn or any other person; and, as there was no indorsement on the registry, Waddle appeared, to all the world, to be the sole owner of the ship, and, consequently, it remained in his order and disposition at the time of his bankruptcy; that the captain of a ship was the agent *of the owner; and an agent was responsible [*351] to no one but his employer. *Stephens* v. *Badcock.*(*b*)

THE VICE-CHANCELLOR:—The substantial question in this case, is whether the bill of exchange is sufficiently identified to enable this Court to say that, for the purpose of the present application, it represents the ship that was sold.

The facts of the case are, certainly, stated somewhat differently in the bill and in the answer; but, although there is some variation between them, I think that enough appears to justify me in saying that the bill does fairly represent the ship; and that this Court ought to interfere so as to prevent the money, due on the bill, from getting into the hands of Mr. Payn.

I shall, therefore, grant the injunction, and give liberty to Mr. Dunbar to pay the principal and interest, due on the bill, into Court.

(*a*) 3 Barn. & Adol. 354.

[*352] *In re WAINEWRIGHT ex parte SLADE.

1842: 9th and 13th December.

The Court of Chancery is not the protector of a settlement, where the tenant for life is a married woman whose husband has been convicted of felony, and the life estate is not settled to her separate use.

THE question in this case was whether the Court of Chancery was the protector of a settlement, where the tenant for life was a married woman, whose husband had been convicted of felony, and the life estate was not settled to her separate use. See 3d & 4th Will. 4, c. 74, (for the abolition of fines and recoveries,) sects. 22, 24, 33 & 91.

THE VICE-CHANCELLOR, after having taken time to consider the question, said: I have read through the act very carefully, and I think that, in this particular case, where the husband alone has been convicted of felony, the 33d section does not constitute the Court of Chancery the protector.

I see nothing whereby I can escape from the conclusion that, in order to constitute the Court of Chancery the protector, both the husband and wife must be convicted of felony.

Mr. *Walford* appeared in support of the petition.

*Broom *v.* Summers. [*353]

1840: 9th December.

A lease of a meeting-house was granted, in trust for a congregation of Protestant dissenters, who then met in a house, belonging to J. A., in the town of S. The congregation was then in connection with the Secession Church of Scotland, and, consequently, professed the same doctrines and adopted the same form of worship, government and discipline as that church. Some years afterwards, the minister and a large majority of the congregation separated from that connection, and joined another religious body, which professed the same doctrines and used the same form of worship, but not the same form of government and discipline as the Secession Church: they, however, retained possession of the meeting-house. Held, that on their separation, they ceased to be objects of the trust; and, therefore, were not entitled to keep possession of the meeting-house.

The bill stated that, in June, 1808, a congregation of Protestant dissenters of the Presbyterian persuasion, who had been in the habit of assembling together, for the purpose of performing their religious worship, in a house at North Sunderland, in Northumberland, belonging to one John Anderson, agreed, with Anderson, to take a lease from him, of a small piece of ground in North Sunderland, for the purpose of building a chapel thereon, for the purpose of their worship: that, accordingly, an indenture, dated the 22d of June, 1808, was made between Anderson of the one part, and James Young, John Crow, John Summers, Ralph Lamb, John Watson, John Robinson and James M'Dougle (in trust for themselves and the rest of the congregation of Protestant dissenters of the Presbyterian persuasion who then occasionally met, in a house belonging to Anderson at Sunderland aforesaid, for public worship,) of the other part, and thereby Anderson demised, to the parties of the second part, a piece of ground at the west end of Sunderland, for 99 years, upon trust that the lessees should hold the same in trust for themselves and the rest of the said congregation of Protestant dissenters; and that the premises should, during the term, be used as a meeting-house or place of worship for the said congregation of Protestant dissenters, and for no other *use. The bill [*354] further stated that money was raised, partly by a loan

and partly by a subscription amongst the members of the congregation, aided by the contributions of some persons who were not members, for the purpose of building the chapel; and that, accordingly, a chapel was built on the piece of ground: that it was usual, with congregations of Protestant dissenters of the Presbyterian persuasion, to join themselves to some Presbytery; and that, some time during the building of the chapel, the congregation joined the Associate Presbytery of Coldstream; and that, a few years afterwards, they joined the United Associate Presbytery of Coldstream and Berwick: that, in 1815, the congregation determined on building a dwelling-house for their minister, and, for that purpose, they agreed, with one Wake, to take of him a lease of a piece of ground in North Sunderland; and, accordingly, an indenture dated the 25th of October, 1815, was made by Wake of the one part, and James Young, James M'Dougle, and Roderick Treasurer (in trust for themselves and the rest of the congregation of Protestant dissenters of the Presbyterian persuasion, who then assembled for public worship in a meeting-house situate in Sunderland, which had been then lately built upon a piece of ground, granted by Anderson, by the lease of the 22d of June, 1808,) of the other part; and thereby Wake demised to the parties of the second part, a piece of ground, situate at the north-east end of Sunderland, for the purpose of building a house upon it for the use and occupation of the minister for the time being of the said congregation of Protestant dissenters, for the term of 91 years, in trust for themselves and the rest of the said congregation of Protestant dissenters, and in order that the premises should be used as a dwelling-house for the minister for the time being of the said congregation

[*355] of Protestant *dissenters: that by means of money raised as before-mentioned, a dwelling-house was built, on the last-mentioned piece of ground, for the minister for the time being of the said congregation: that, in July, 1833, the plaintiff was elected by the congregation, and had ever since been and still was the minister of the said congregation; and, in April, 1834, he was ordained minister thereof, and, as such minister, he thereupon became and had ever since been and still was entitled

to the exclusive use of the chapel for the purpose of doing duty and performing religious worship therein for the said congregation; and that he also thereupon became and had ever since been and still was entitled, as such minister, to reside in the dwelling-house. The bill then stated that, in 1835, the plaintiff, and some of his flock, were desirous that the treasurer of the congregation and the collectors of the pew rents, should give an account of the money received by them on account of the chapel; and the congregation, accordingly, called upon them to give such account, but they refused so to do; whereupon they were suspended from communion with the congregation, for conduct inconsistent with the rules of the society: that the treasurer and collectors applied to the Presbytery of Coldstream and Berwick, who received some allegations reflecting on the plaintiff, and summoned him to their bar and reprimanded him; whereupon he appealed to the synod, who expressed their disapprobation of the proceedings of the presbytery, found the plaintiff's protest to be well-founded, and appointed the record, in the minutes of the presbytery, to be deleted: that the presbytery having acted towards the plaintiff in manner aforesaid, he and the congregation became desirous of joining themselves to another presbytery; and, accordingly, at a congregational meeting regularly called, it was agreed by the plaintiff and *330 [*356] of the members and seat-holders of the congregation (which then consisted of 412 members and seat-holders,) that the plaintiff and the congregation should leave the said presbytery and synod and join themselves to another Protestant dissenting presbytery, as they were entitled to do; and, accordingly, the plaintiff and such of his congregation as then remained with him, being in number 330 and making four-fifths of the congregation, left the Presbytery of Coldstream and Berwick, and joined the Presbytery of the north-west of Northumberland: that that presbytery held precisely the same religious principles and doctrines, used precisely the same mode and form of worship, had precisely the same form of government, and administered precisely the same discipline, in every respect, as the Presbytery of Coldstream and Berwick, and that the plaintiff and his con-

gregation, or such four-fifths thereof as joined the Presbytery of the north-west of Northumberland, continued to hold after they joined the last-mentioned presbytery, and had ever since held and did then hold precisely the same religious principles and doctrines, and continued to use precisely the same mode and form of worship, and to have precisely the same form of government, and to administer precisely the same discipline, in every respect, as they did when they were united to the Presbytery of Coldstream and Berwick: that the plaintiff could not be removed from his office of minister of the chapel, except by the congregation or the Presbytery of the north-west of Northumberland; but no attempt had been made to remove him, by either of those bodies: that he had always done his duty in every respect, as minister, and was entitled to continue to do duty in the chapel and to reside in the dwelling-house: that the treasurer and collectors and about 80 of their friends, altogether left the [*357] said congregation, and *about two years since, hired a place of worship in North Sunderland; and they, or the Presbytery of Coldstream and Berwick, appointed a minister to do duty for them therein: that the terms for years granted by the deeds of June, 1808, and October, 1815, were then vested in the defendants Summers and M'Dougle, as trustees for the congregation, of which the plaintiff was such minister as aforesaid, and for no other use or purpose: that M'Dougle was not a member or seat-holder of that congregation, and Summers had seceded therefrom, and joined the congregation meeting in the other place of worship: that they, having the legal interests in the chapel and dwelling-house vested in them, resolved to turn the plaintiff out of possession thereof, and, in Easter Term, 1840, brought two actions of ejectment against him for that purpose: that he had no defence, to the actions at law, and that he could only be relieved therefrom, in a court of equity, by having the defendants removed from their situation of trustees of the leases, and new trustees thereof appointed. The bill accordingly prayed for the removal of the defendants and the appointment of new trustees, and for an injunction to restrain the prosecution of the ejectments.

1840.—Broom v. Summers.

It appeared, from the answer, that the congregation became connected with the Secession Church of Scotland, in September, 1807. The answer admitted that the Presbytery of the north-west of Northumberland, held precisely the same principles and doctrines, and used the same mode and form of religious worship, as the Presbytery of Coldstream and Berwick, but denied that it had the same form of government: for that the Presbytery of Coldstream and Berwick belonged to and had the same form of government as the *Secession Church [*358] of Scotland, which was by kirk sessions, presbyteries and synods. Whereas the Presbytery of the north-west of Northumberland, had no connection whatever with any synod or regularly constituted church, but was merely a voluntary society, recognizing no superior, and free from the control of any system of church government properly so called. The answer added that the defendants could not set forth whether the Presbytery of the north-west of Northumberland, administered the same discipline as the Presbytery of Coldstream and Berwick, or whether it exercised any discipline.

Mr. *Jacob* and Mr. *Purvis*, for the plaintiff, now showed cause against dissolving the injunction:—It is a matter wholly immaterial and purely voluntary, whether a congregation of Presbyterians belongs to one presbytery or to another. The congregation for whose benefit the leases were granted, is described in the deeds, not as connected with any particular presbytery, or as subject to any particular visitatorial power; but as a congregation of Protestant dissenters of the Presbyterian persuasion. The congregation which now attends the chapel, answers that description in every particular. It has changed neither its doctrines nor its form of worship, but only its presbytery, which is a matter wholly immaterial to the object of the trust. The congregation, and not the presbytery, are the *cestuis que trust;* and the change of the presbytery does not alter the identity of the congregation.

Mr. *Purvis* said that the answer admitted that a very large

majority of the congregation adhered to the plaintiff;
[*359] and that its doctrines, principles and form of *worship were the same as those of the Coldstream and Berwick Presbytery. [THE VICE-CHANCELLOR: The answer does not admit that the congregation has the same church government and discipline (which are matters of great importance with presbyterians) as it had when it was connected with the Presbytery of Coldstream and Berwick.]

Mr. *Knight Bruce* and Mr. *S. Atkinson* appeared for the defendants; but

THE VICE-CHANCELLOR, without hearing them, said: The only question is whether, upon the answer of the defendants, it can be taken that those persons who have seceded from the ecclesiastical jurisdiction exercised over the congregation as it existed at the time when the lease of the chapel, or rather of the piece of ground on which it was built, was granted, can be said to be *the* congregation.

The answer states that the form of church government adopted by the church of which the Presbytery of Coldstream and Berwick is a member, is by kirk sessions, presbyteries, and synods: that the kirk sessions consists of the minister' and certain members of the congregation called elders, who have jurisdiction, in spiritual matters only, over the congregation, and manage its internal affairs; that the presbytery is composed of the ministers of a district, together with an elder from each session, and exercises jurisdiction over the district from which the members are selected; and that the synod (to which an appeal lies from the presbyteries) is formed by an assembly of all the presbyteries of the Secession Church, and its jurisdiction extends over the whole of them. And it seems quite clear, on the face
[*260] of the answer, that, at the time when the lease was granted, the congregation therein referred to, was governed by session discipline.

No question is raised about doctrine.

It appears that Mr. Broom and several other persons belong-

ing to his congregation, have severed themselves from that mode of church government; and I cannot think that he and those persons who take part with him, do compose the congregation which was had in view at the time when the lease was granted.

The language of that instrument is very remarkable. It is made between Mr. Anderson and certain other persons, in trust for themselves and the rest of the congregation of Protestant dissenters of the Presbyterian persuasion who then occasionally met at a particular house; and it appears, from the answer, that the congregation of Protestant dissenters of the Presbyterian persuasion, was (to use the words of the answer) then congregated into the Secessiou Church. Now, Mr. Broom and the persons who adhere to him, have altogether seceded from that church; and consequently they do not answer the description of the congregation for whose benefit the lease was granted.

There being then no trust subsisting as to that lease, of which Mr. Broom and his adherents are the objects, the order for dissolving the injunction must be made absolute.

1840.—Kent v. Burgess.

[*361] *KENT *v.* BURGESS.—WINKWORTH *v.* BURGESS.—WINKWORTH *v.* BURGESS.

1840: 12th December.

A marriage between a British subject domiciled in England, and a female ward of Court, was celebrated in the presence of the British consul and in the English church at Antwerp, by a clergyman of the church of England, who had been appointed chaplain to the church, and was paid by the British government. Held, that the marriage was invalid, as certain ceremonies prescribed by the law of Belgium had not been observed.

The Court, on an interlocutory application, will direct a reference or issue, to ascertain a fact on which the title of the parties depends.

Whether the parties ought to be bound by the finding, at the hearing of the cause: *Quere.*

A. married a female ward of Court without consent of the Court, and had been guilty of great contumacy in other respects. The Court directed the ward's fortune to be settled so as to exclude A. from taking any interest in it.

RICHARD KENT, late of Ramsgate, in Kent, by his will, dated the 6th of August, 1828, gave the residue of his personal estate and of the produce of his real estates, which he directed to be sold, to trustees in trust to apply the income for the maintenance and education of the plaintiff, Marianna Kent (an illegitimate child, whom he described as his adopted daughter who then lived with him, and who was born at Ghent in Flanders, on the 19th of October, 1820,) until she should attain 21 or marry with the consent of his trustees, and, on her attaining that age or being married, to assign the capital to her; but, in case she should die under 21 or be previously married without such consent as aforesaid, to stand possessed of the property in trust for his three nephews for their lives, and, after their deaths, for their children absolutely.

*In January, 1837, the testator made a codicil, by which [*362] he left his residuary estate to the plaintiff, and, in case of her death before she attained 21, to two of his grand-nephews. The codicil, however, was not duly attested.

The testator died in January, 1837.

In March following, the plaintiff filed the bill in *Kent* v. *Burgess*, praying that the trusts of the will might be performed under the direction of the Court, that an allowance might be made for her maintenance and education, and that some person might be appointed her guardian. In August, 1837, the Court appointed the trustees of the will to be the guardians of the plaintiff, and made them an allowance for her maintenance and education. In February, 1838, the plaintiff eloped with Stephen Winkworth, from the house of one of her guardians at Ramsgate; but was shortly afterwards brought back. Winkworth was committed to the Fleet, under an order in the cause obtained by the guardians; but was shortly afterwards released, on his signing an undertaking not to have any further communication with the plaintiff. However, in May, 1838, he prevailed on the plaintiff to elope with him again, and to accompany him to Antwerp in Belgium: and in July following a marriage ceremony, according to the rites of the Church of England, was performed between them at the English church at Antwerp, by the chaplain of the church (a clergyman of the Church of England in full orders,) and in the presence of the British consul there. A few days before that marriage, the cause of *Kent* v. *Burgess* was heard for further directions. In August, 1838, the plaintiff, by the name and description of "Marianna Winkworth, the wife of *Stephen Winkworth," filed a bill of [*363] revivor and supplement, by her next friend, stating that she had intermarried with and was then the wife of the defendant, S. Winkworth, and praying (amongst other things) that it might be referred to the Master, to approve of a proper settlement on her in respect of the property bequeathed to her by the testator. In February, 1839, the plaintiff presented a petition in the two causes, stating her elopement and marriage; that she was then cohabiting with Winkworth, as her husband, at Boulogne in France; that she was pregnant, and that she entertained doubts as to the validity of the marriage, and praying that a second marriage might be solemnized between her and Winkworth, and that the trustees might be at liberty to consent to it. In March, 1839, the petition was heard, and, Winkworth appearing by his

counsel and undertaking to execute such settlement as the Court might direct, it was ordered that the trustees should be at liberty to consent to the proposed marriage; but the order was to be without prejudice to any question in the causes.

The trustees having given their consent, the parties were married, at Barking in Essex, in April, 1839; and, in May following, they were again married, with the consent of the trustees, at a church in Southwark. In June, 1839, an order was made on the petition of the plaintiff, by which it was referred to the Master to inquire and state whether a valid marriage had been had between the parties, and, if so, when and where it took place.

Winkworth was taken into custody under an order pronounced shortly after the second elopement; but soon afterwards
[*364] was discharged, on giving security to appear *in Court, personally, whenever the Lord Chancellor should order him to do so.

In November, 1839, the plaintiff, by her next friend, filed another bill of revivor and supplement, by her last-mentioned name and description, stating the third marriage, and praying, (amongst other things,) for a reference to the Master to approve of a proper settlement of her property.

In July, 1840, the Master, in obedience to the order of June, 1839, reported that he saw no reason to doubt that either of the two last marriages, in the absence of the other of them, was valid, provided the marriage at Antwerp was void; wherefore he had proceeded to examine the circumstances attending that marriage. The Master then found, from the documents and evidence that had been laid before him, that Winkworth was a natural born British subject; that the plaintiff was born at Ghent, in Flanders, on the 19th of October, 1820, and was the illegitimate child of the testator,(a) and was adopted, maintained, and educated by him until his death, and that, afterwards, she was maintained, out of his property, until her second elopement; that the Code

(a) It was admitted, in the progress of the argument, that both the testator and the plaintiff's mother, were British subjects.

Civil was the law in force in Belgium; and that no marriage contracted in that country, could be valid by reason of there having been a religious ceremony only; but that a civil ceremony and a variety of other formalities, all of which had been omitted, were requisite; moreover, that neither of the parties was of the age required, by the Belgic law, to enable them to *contract matrimony without the consent of [*365] their parents or guardians; and, consequently, that the Antwerp marriage was invalid, according to the *lex loci*. The Master, however, was of opinion that the marriage was valid, according to the subsisting English law; because it would have been a good English marriage before the passing of the 26th Geo. 2, c. 33, (the late marriage act;) and that act was repealed by the 4th Geo. 4, c. 76, (the present marriage Act,) the enactments of which were expressly confined, by sect. 33, to marriages in England.

The Master then found, at the request of the plaintiff's solicitor, that there was no ambassador from the British Court accredited at Antwerp, nor any British Factory there; and that the clergyman who solemnized the marriage had been appointed to officiate in the English Church at Antwerp, by the British Secretary of State for foreign affairs, on the recommendation of the Bishop of London.

Before either of the supplemental suits was heard, three petitions in the original and supplemental suits, came on to be heard.

One was presented by the trustees of the will, and prayed, amongst other things, that the report might be confirmed, so far only as the Court should think fit; and especially, if the Court should think fit, that it might be confirmed so far only as it found that a valid marriage had taken place between the plaintiff and Winkworth; and that it might be referred to the Master to approve of a proper settlement on the plaintiff and her issue. Another was presented by the plaintiff, and prayed for the confirmation of the report so far *as it found the [*366] Barking marriage valid, and for a reference to the Master to approve of a proper settlement. The remaining petition

was presented by one of the defendants, and prayed for the confirmation of the report, so far as it found the Antwerp marriage valid.

Mr. *G. Richards* and Mr. *Loftus Wigram* for the trustees: Our clients do not wish to take any part in discussing the question whether the Master was right or not in finding that the Antwerp marriage was valid. If the Court shall think that the Master was right in that respect, the consequence will be that, as that marriage was had without the consent of the trustees, part of the property to which the plaintiff would have been entitled, if she had married with the consent of the trustees, will go over. All that the trustees ask, is that a proper settlement may be made of the plaintiff's property, whatever it may be.

Mr. *Wigram* for some of the defendants who were entitled under the gift over in the will: The Court is now asked to decide, on petition, which (if any) of the three marriages is valid, there being supplemental bills filed for that purpose: and I submit that the Court can not regularly decide that question, which is a most important one, before the supplemental suits are heard.

THE VICE-CHANCELLOR:—The best way will be for me to hear the plaintiff's petition opened. I shall then understand more of the case, and be better able to deal with the question that has been raised.

Mr. *Knight Bruce* and Mr. *Jacob* for the plaintiff:

[*367] The defendants for whom Mr. Wigram appears, *were parties to the order under which the report to which the petitions relate, was made. They have never appealed from that order; they might have gone in before the Master under it. But they now object to the Court's dealing with the report made upon a reference to which they were parties.

By the codicil all the testator's residuary estate is given to the plaintiff, whether she marries with consent or not; but, as that codicil was not duly attested, it does not alter the disposition in the will, so far as the produce of the real estate is concerned;

and, therefore, it is important to know whether the Antwerp marriage, which was had without the consent of the trustees, was valid or not; for, if it was valid, so much of the residuary estate as consists of the produce of real estate, has gone over under the will. If the Antwerp marriage was invalid, then the Barking marriage, which all parties admit was had with consent, was valid, and the plaintiff is entitled to have the whole of the testator's residuary estate, consisting of personalty and the produce of the realty, put in settlement.

The conclusion which the Master has come to respecting the Antwerp marriage, is a very singular one; for he is of opinion that a marriage may be bad according to the *lex loci*, and yet good according to the law of another country. If, indeed, there had been either a British ambassador or a British factory at Antwerp, and the marriage had been celebrated either in the chapel or in the house of the ambassador, or in the factory, then by 4 Geo. 4, c. 91, the marriage would have been good, though not solemnized according to the *lex loci*;(a) but the Master *has found that there is no British ambassador accredited [*368] at Antwerp, nor any British factory established there. Consequently the marriage, in order to be good, ought to have been celebrated according to the Belgic law. The error into which the Master has fallen, has arisen from his supposing that the marriage Act of Geo. 2, had anything to do with marriages solemnized abroad. The truth is that both that Act and the Act of Geo. 4, exclude foreign countries from their operation; and consequently the validity of a marriage celebrated between British subjects in a foreign country, has been subject to the same consideration, since the passing of those Acts, as it was before; that is, whether it was had according to the law which regulates marriages in that foreign country. Of whatever country the parties who wish to contract marriage are natives, they must effect the relation of husband and wife, according to the law of the country in which they happen to be at the time; otherwise it is no marriage at all. *Scrimshire* v. *Scrimshire*;(b) *Middleton* v.

(a) See also 4 Geo. 4, c. 67; and 3 & 4 Will. 4, c. 45.

(b) 2 Haggard's Consist. Rep. 395.

Janverin;(a) *Lacon* v. *Higgins*;(b) *Swift* v. *Kelly*.(c) It is true that the marriage was solemnized in the presence of the British consul at Antwerp; but consuls have not the same character or the same privileges as ambassadors have. They are appointed merely for the protection of trade.

Lastly, Miss Kent was illegitimate, and was born at Ghent, consequently, she was a Belgian subject at the time of the marriage; for an illegitimate child cannot claim the country [*369] of its parents. There was, therefore, *a stronger reason than has existed in any former case, for the parties complying with the law of the country in which they were married.

Mr. *West*, for the defendant, Stephen Winkworth:—By the law of Belgium, foreigners cannot intermarry until they have resided six months in that country. Now it appears, from our affidavits, that the parties had not resided in Belgium for anything like that length of time when they intermarried. Mr. Winkworth, too, was under 25 at the time; and therefore, according to the same law, he was incapable of contracting marriage without the consent of his parents. Besides, the civil ceremony was omitted, and other formalities prescribed by the Belgic law, were not observed; and, although it is true that, in cases where there is an insuperable difficulty in complying with the *lex loci*, that law may be dispensed with, yet no such difficulty existed in this case: more especially as there was a British ambassador at Bruxelles, which is only a short distance from Antwerp: so that if the parties had gone only a few miles further, they might have contracted a marriage which would have been indisputably good according to the laws of England. *Dalrymple* v. *Dalrymple*;(d) *Scrimshire* v. *Scrimshire*; *Middleton* v. *Janverin*; *Herbert* v. *Herbert*.(e) In this last case, it was not even suggested that the marriage was good by the law of England as it existed

(a) 2 Haggard's Consist. Rep. 437.
(b) 3 Starkie's N. P. C. 178.
(c) 3 Moore's Privy Coun. Cases, 257.
(d) 2 Hagg. Cons. Rep. 62.
(e) Ibid. 272.

before the Act of Geo. 2 was passed: but it was established to be a valid marriage, because it was celebrated according to the law of Sicily, where it took place.

*Besides, the plaintiff was a Belgian and not a British subject; for she was an illegitimate child, and born at Ghent: and, being under age, she could not have gained a settlement in this country. *Whitechapel* v. *Stepney*.(a) [*370]

With respect to the settlement which ought to be made, I beg to refer your Honor to what was said by Lord Eldon, C., in *Bathurst* v. *Murray*.(b) That was a case of very gross contempt. The young lady was only 16. She was entitled to a very large fortune; and there was great inequality of condition between her and her husband; the latter being the son of a miller and a silversmith's apprentice: and yet Lord Eldon disapproved of a settlement by which the whole of the lady's fortune was settled on her and her children and relations, and said that the husband ought to have 150*l.* a year during the coverture, with a power to the wife, to increase it to 300*l.* a year, by her will.

Mr. *Wigram* and Mr. *Baily*, for some of the parties entitled under the gift over in the will, insisted that the plaintiff was a British subject, as it had been admitted that her mother was an Englishwoman:(c) and that, as the question as to the validity of the marriages was the question upon the decision of which the plaintiff's title to the testator's residuary property depended, it could not be decided on an interlocutory proceeding, or before the supplemental causes were heard.—[THE VICE-CHANCELLOR:—The order of June, 1830, by which the Master was directed to inquire into and report as to the validity of the several marriages, was made under these circumstances. An infant's bill had been filed; and then a bill of revivor and settlement was filed, in which the infant described herself as the wife of Stephen Winkworth. Obviously, therefore, it was necessary to know whether she did sus- [*371]

(a) Carthew, 433. S. C. Burr. Sett. Cases, 487.

(b) 8 Ves. 74.

(c) Story Conflict of Laws, p. 44.

tain that character or not. Independently of any question about property, the Court must know whether the infant has the character in which she professes to sue. Thus, in Mr. *Bowes's case*,(a) where that gentlemen thought proper to file a bill, stating himself to be Earl of Strathmore, Lord Eldon said that it was absolutely necessary, before the case proceeded, to have that fact ascertained; and, accordingly, his Lordship directed that proceedings should be taken in the House of Lords for the purpose of determining that question. Besides, there was another reason which induced me to direct the reference, and that was that where the Court sees that there is a question which must be determined sooner or later, it has thought it right to direct an interlocutory proceeding, in the first instance, which will have the effect of determining the question. That was the course adopted by Lord Eldon in *Golden* v. *Ulyate*.(b) The circumstances of that case were as follows: the plaintiff claimed to be the next of kin of an intestate, and filed a bill for an account of the intestate's estate. The defendant insisted that the plaintiff was illegitimate. Upon a motion being made for a receiver, in 1809, his Lordship directed an issue to try the question of legitimacy, although it was strongly urged that the Court was acting irregularly, and ought not to direct such a question to be tried until the hearing. But Lord Eldon said that the [*372] question must be tried sooner or later, and *that he would not wait until the hearing, but would direct the issue in the first instance.(c)]—In *Gompertz* v. *Ansdell*,(d) Lord Cottenham, C., on an interlocutory application, directed an issue to be tried for the purpose of ascertaining whether a person named Henry Guilling Isaac, through whom some of the defendants claimed, was born in wedlock or not. Upon the trial of the issue the jury found a verdict, the effect of which was that H. G. Isaac was not born in wedlock. The parties, however, went into evidence in the cause in support of their title; and when the cause came on to be heard, the Lord Chancellor held that

(a) 2 J. & W. 541.
(b) Not reported.
(c) See *Fullagar* v. *Clark*, 18 Ves. 481.
(d) 4 Myl. & Cr. 449.

they had a right so to do, and that the verdict was not conclusive: and his Lordship directed another issue to be tried for the purpose of determining the fact in dispute. On the trial of that issue, the jury found in favor of the legitimacy of H. G. Isaac. A motion was afterwards made for a new trial, which his Lordship granted.(*a*)—[THE VICE-CHANCELLOR: I have no doubt that it was right, in *Gompertz* v. *Ansdell*, to direct, at the hearing, that the issue granted on the interlocutory application should be tried over again. But, in *Golden* v. *Ulyate*, Lord Eldon, in 1811, refused a motion for a new trial: and, when the cause was heard, in 1820, the defendant asked for another issue, but his Lordship refused to grant it: so *that he abided himself, and made the parties abide by the verdict found on the trial of an issue directed on an interlocutory application.(*b*) If the order of June, 1839, was wrong, why was it not appealed from?] We think that it was proper to direct the inquiry, but not to bind the rights of the parties by the Master's finding: for, at the hearing, we shall be clearly entitled to have the question again inquired into, and to bring forward evidence in addition to that which appears on the Master's report. [*373]

The Antwerp marriage was solemnized by a minister of the Church of England, in a chapel, and in the presence of the British Consul: therefore, the 4th Geo. 4, c. 91, not only is not (what the counsel on the other side have assumed it to be) a legislative declaration that the marriage in question was invalid; but is a legislative declaration to the contrary: for it declares that marriages so solemnized, not only are, but always have been valid. It is, therefore, incorrect to say that marriages had in a foreign country, were invalid, unless they were celebrated according to the law of that country; the legislature itself having, expressly, declared the contrary. The Act commences with reciting that it was expedient to relieve the minds of His Majes-

(*a*) In *Gompertz* v. *Ansdell*, the ground on which Lord Cottenham directed the issue to be tried a second time, appears to have been, that the case had been so varied by the evidence in the cause, that the Court could not say that there had been a finding, by a jury, on the case as it then existed. (See 4 Myl. & Cr. 456.)

(*b*) See post, 377.

ty's subjects from any doubt concerning the validity of marriages of a certain character; and then it proceeds to declare the doubt to be unfounded. *Ruding* v. *Smith*.(a) We submit that the Court cannot, in this stage of the cause and without much more information than it now possesses, decide that the [*374] marriage in question is not good; and that a *further inquiry should be directed in order to ascertain whether it is not one of those marriages which Lord Stowell, in his judgment in *Ruding* v. *Smith*, and the legislature, in the Act of Parliament last referred to, show may be valid though not celebrated according to the law of the country. [THE VICE-CHANCELLOR: I do not see anything, in the Master's report, which tends to show the character which the church at Antwerp bore.] —The clergyman who performed the marriage ceremony, was appointed and paid by the Government of this country; and so was the consul.—[THE VICE-CHANCELLOR: Lord Stowell founds his judgment in *Ruding* v. *Smith* upon the following grounds, namely, on the distinct British character of the parties; on their independence of the Dutch law in their own British transactions, and on the insuperable difficulties of obtaining any marriage according to the Dutch law.]

Mr. *Menteath*, for other parties whose interest it was to contend that the Antwerp marriage was valid:—British subjects who wish to contract marriage in a foreign country, must conform to the law of that country, except in particular cases: and I submit that this is one of the excepted cases. For, first, by the Code Civil, persons who marry without the consent of their parents or guardians, must have attained the age of 25. Now, at the time when the Antwerp marriage was had, Mr. Winkworth was in his 24th year: therefore, he was not able to avail himself of the *lex loci*. Secondly; by the law of Belgium, foreigners cannot intermarry unless they have resided six months in that country. The parties arrived in Belgium in May, and were married in July; consequently they had not resided any-

(a) 2 Hagg. Cons. Rep. 386; see the judgment.

thing like the time required to enable them to avail themselves of the *law of Belgium :(a) *Harford* v. *Morris*.(b) The decision in *Scrimshire* v. *Scrimshire*, and *Middleton* v. *Janverin*, rested on a ground which does not exist in the present case: for, in those cases, the marriages were bad according to the *lex loci* to which the parties had resorted. [*375]

Next; the marriage having taken place in the presence of the British consul resident at Antwerp, it is good according to 4 Geo. 4, c. 91; for the consul was a British minister, within the words of that Act.(c)—[THE VICE-CHANCELLOR: The words used in the Act are: "To the Court of which he is accredited." Those words apply not to a consul, but to an ambassador; and the Master has found that there was no British ambassador at Antwerp.]—The 4 Geo. 4, c. 91, is a remedial Act, and therefore ought to be construed liberally. Lastly, if the marriage is not good according to that Act, it is good according to the common law as it existed prior to the passing of the 26 Geo. 2, c. 33.

THE VICE-CHANCELLOR:—This case is now brought forward in such a manner as to induce me to suppose that, if I were to direct any further inquiry, it would not be productive of any important result. I think that the report must be adopted so far as it finds that the Antwerp marriage was celebrated contrary to the *lex loci;* and so far as it finds that a valid marriage took place in England, after the 4th March, 1839, the time at which the trustees gave their consent.

*My opinion is that this case is not within the 4th Geo. 4, c. 91; for that statute provides for the case of a marriage solemnized, by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country, to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory. But, as there is no factory or ambassador at Antwerp, the case cannot [*376]

(a) 1 Burge Colon. Law, 199; 2 Hagg. Consist. Rep. 389, *et seq.*

(b) Ibid. 423.

(c) See *Viveash* v. *Becker*, 3 M. & Sel. 284.

come within that statute. Every one who reads the judgment of Lord Stowell in the case of *Ruding* v. *Smith*, must perceive that that learned judge came to the conclusion that the marriage in that case was good, because difficulties, which he denominates insuperable, existed in effecting a marriage according to the Dutch law. In this case, however, there were no insuperable difficulties which prevented a marriage from being had according to the Belgian law; and, therefore, there are no circumstances of exception here, which operate to take the marriage out of the general rule, which requires that marriages abroad, in order to be valid, must be celebrated according to the *lex loci*. And, that being so, the report must be confirmed so far as it finds that the marriage at Antwerp, was invalid, and that the subsequent marriage in England, was good.

The case is in that state at present, that there seems to me to be no impropriety in making a decision to that extent.

It stands thus: The testator died in 1837. Shortly afterwards the infant's bill was filed, and then the elopement and first marriage took place; and then a bill of revivor and supple-
[*377] ment was filed, on the 1st of August, *1838, in which the infant described herself as being the wife of S. Winkworth. Then came the order of June, 1839, which was made in both the causes; and, on the 13th of November, 1839, the young lady filed another bill of revivor and supplement, in which she again described herself as the wife of Stephen Winkworth. The Master then made his report in all the three causes; and it becomes necessary to examine how far the character of wife was sustained, by the lady, when she filed the bills of revivor and supplement.

Now, it clearly was held, by Lord Eldon, in *Golden* v. *Ulyate* (a case which I mentioned before, and in which I was counsel,) that, when the Court sees that there is a question which must be decided sooner or later, it may, on an interlocutory application, direct either an issue or an inquiry, for the purpose of determining that question; and, in this case, I do think it necessary, for the purpose of going on with these causes, that the Court should know in what character the lady stands.

It has been said that my opinion on this point, differs from that which the Lord Chancellor expressed in a recent case. But if so, I am borne out by the authority of Lord Eldon, upon which I have often acted in this Court; and I am not aware that any decision of mine upon the point, has been ever appealed from. I think that an end ought to be put to the question as soon as possible.

With respect to the construction of the codicil, I may now declare that the plaintiff is entitled to the clear residue of the personal estate, subject to the gift over in case of her decease before 21; and it must be referred *to the [*378] Master to approve of a proper settlement of her property.

As her husband has been guilty of very great contumacy, the settlement ought to be so framed as to exclude him from taking any benefit under it. The property, therefore, must be settled on the plaintiff for her life, with remainder to her issue, and, in default of issue, as she shall, by will, appoint. As she is illegitimate, she can have no next of kin: and, therefore, no ultimate limitation can be made which will have the effect of preventing the husband from taking as administrator to his wife; but, in default of appointment, the property must be limited to her absolutely.

Cochrane *v.* Robinson.

1840: 15th December.

Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The executor and trustee of the will had never been in possession of the estates. Held, nevertheless, that he was entitled to be indemnified in respect of the rents and covenants.

In this case, leasehold estates of a testator, had been sold under a decree directing the trusts of the will to be carried into execution. The executor and trustee of the will had never been in possession of the estates; and the question was whether he was

entitled to be indemnified in respect of the rents and covenants reserved contained in the leases under which the estates were held.

THE VICE-CHANCELLOR decided that the executor and trustee was entitled to be indemnified, and referred it to the Master to approve of the indemnity.

[*379] *Mr. *Knight Bruce*, Mr. *Stuart*, and Mr. *James Parker*, were counsel in the case. The cases of *Simmons* v. *Bolland*;(a) *Hawkins* v. *Day*;(b) and *Vernon* v. *Lord Egmont*,(c) were referred to.

PLUNKETT *v.* LEWIS.—EVELYN *v.* LEWIS.

1840: 11th December.

Two decrees had been made for the administration of the estate of A. B. deceased, one in a creditors' suit, and the other in a legatee's suit.

A motion by the plaintiff in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, was refused, there being no suggestion of a deficiency of assets.

THE bill in the first cause was filed by a creditor of a person deceased, and the bill in the second, by a legatee of the same person. The plaintiff in the second cause, was an infant. The bill in the first cause was filed in July, 1839, and the bill in the second cause was filed in August following. The decree in the second cause was dated on the 14th of July, 1840, and the decree in the first, on the 31st of the same month. The two decrees were in the offices of different Masters, and advertisements for creditors had been published in each suit.

Mr. *Knight Bruce* and Mr. *Richards* for the plaintiff in the first

(a) 3 Mer. 547. (b) Ibid. 555; and Amb. 160.
(c) 1 Bligh, N. S. 554.

suit, now moved that the prosecution of the decree in the second cause, so far as it directed an account to be taken of the deceased's personal estate and debts, might be stayed. They urged the inconvenience, confusion and unnecessary expense which would be caused by the creditors being twice examined and the accounts of the personal estate being twice taken.

*THE VICE-CHANCELLOR:—It is not suggested that [*380] there is any deficiency of assets; and, that being so, I see no reason why I should interfere.

There may be an application made under such circumstances as may make it right for the Court to interfere; but no such case is now made.

Mr. *Jacob*, Mr. *Girdlestone*, Mr. *Stuart*, Mr. *K. Parker*, Mr. *Teed*, and Mr. *Bacon* appeared to oppose the motion.

THE ATTORNEY-GENERAL *v.* THE EAST INDIA COMPANY and others.

1840: 14th and 15th December.

An information and bill was filed, to set aside a long lease of premises vested in the Coopers' Company for charitable purposes. The plaintiffs were three members of the court of assistants of the Company, (who alleged that they acted as trustees of the charity,) and an almsman and almswoman, who were objects of the charity. A general demurrer to the information and bill was allowed, as no relief was prayed with respect to the plaintiffs individually. But leave was given to amend the record, by making it an information only.

IN this case an information and bill, in which five individuals were both relators and plaintiffs, was filed against the East India Company, J. C. Melvill, (who was the Secretary to that Company,) the Coopers' Company, and certain other persons, stating, in effect, that in the 6th year of the reign of King Edward the 6th, a school-house, alms-house, and certain other tenements, (situate at Ratcliffe in Middlesex,) were vested in the Coopers'

Company, in trust to pay, for ever, to the head master and under master of the school, the yearly salaries of 10*l.* and 6*l.* 13*s.* 4*d.* respectively, and, to [*381] *14 poor men and women in the alms-house, the yearly sum of 26*s.* 8*d.* each, and to make certain other payments of specific sums. The information and bill further stated that, on the 30th of October, 1770, the Coopers' Company granted a lease of certain parts of the property, consisting of two wharves with the houses, sheds, and other erections thereon, to the East India Company, for the term of 260 years, at the yearly rent of 155*l.*; that three of the plaintiffs were members of the court of assistants of the Coopers' Company, which was the governing body of that Company; and that those three plaintiffs, as members of such court, acted as trustees of the said charity, and were respectively bound duly to administer the funds of the charity for the benefit thereof: that the two other plaintiffs were an almsman and almswoman entitled to receive the benefit of the charity, and were interested in the due application of the revenues thereof: that, in Trinity term, 1839, the Coopers' Company commenced an ejectment, against the East India Company, for recovering possession of the demised premises, but they refused or neglected to proceed with the action, or to institute other proceedings for the purpose of setting aside the lease and recovering the full annual value of the demised premises for the benefit of the charity; that, under the circumstances stated in the information and bill, the lease was obtained, by the East India Company, by fraudulent means, and ought to be set aside; and that the grant of the lease for the term of 260 years, was a breach of trust on the part of the persons constituting the Coopers' Company at the time: that the defendants then had, in their custody or power, various deeds, &c., relating to matters contained in the information and bill: that the East India Company was a corporate body, and the plaintiffs were unable to have a discovery, upon oath, [*382] *of the matters aforesaid, without making Melvill a party to the suit.

The bill prayed that it might be declared that the lease was obtained, from the Cooper's Company, through fraud; and that

the same might be set aside for the benefit of the charity; and that it might be declared that the execution of the lease was a breach of trust on the part of the persons constituting the court of assistants of the Coopers' Company at the time; and that the lease might be declared invalid, and be delivered up to be cancelled; and that a proper occupation rent might be put upon the premises comprised in the lease; and that the East India Company might be decreed to account, with the Coopers' Company, for such rent; and that the full annual improved value of the premises might be received, by the Coopers' Company, and applied by them for the benefit of the charity; and that, if necessary, the East India Company might be decreed to deliver up possession of the premises to the Coopers' Company.

Melvill demurred to the discovery, and the East India Company demurred to the discovery and relief prayed by the information and bill.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Lloyd*, for the demurring parties: The ostensible object of the information and bill, is to set aside the lease granted in 1770. The information and bill treats the demised premises as charity property; for it prays that the lease may be set aside for the benefit of the charity. The plaintiffs seem to be impressed with the notion that it is the practice of the Court to set aside every lease of charity property, *if it be a long lease. But that notion is erroneous; for no case has been decided that the mere length of a lease, is, of itself, a sufficient ground for setting it aside. In order to induce the Court to interfere, the lease must be shown to have been an improvident one at the time when it was granted. In this case it appears that the property demised is a piece of ground measuring no more than 135 feet by 227, and that the East India Company pay for it so large a rent as 155*l.* a year. *The Attorney-general* v *Hungerford*;(*a*) *The Attorney-general* v. *Cross*.(*b*) [*383]

Secondly; in the instrument by which the property, which is

(*a*) 2 Clark & Fin. 357. (*b*) 3 Mer. 524.

alleged to be charity property, was vested in the Coopers' Company, there is nothing whatever which binds that Company to do more than make the specified payments. Those payments are less in amount than a quarter of the rent payable to them by the East India Company: and, if the Coopers' Company are only liable to pay those sums, the property is not charity property, but belongs to the Coopers' Company subject to those payments.—[THE VICE-CHANCELLOR: There is nothing said about the surplus rents.]—Thirdly: the bill alleges that three of the plaintiffs are members of the court of assistants of the Coopers' Company; and that, as such, they act as trustees of the charity, and are bound duly to administer the funds of the charity. Those three persons, however, have no right to make themselves plaintiffs on this record; for they have no such interest in the subject-matter of the suit as entitles them to do so: moreover, if they ought to be parties, all the other members of the court of assistants ought to be parties; for there [*384] is no reason *why those three should be singled out.

The same observations apply to the two other plaintiffs, the almsman and almswoman. This objection on the ground of misjoinder, is not a mere objection to the form of the suit, but to the very substance of it: for the Attorney-general and his Court have, neither of them, the same control over an information and bill, as they have over a simple information. If an information is improperly filed, the proceedings in the suit may be stayed: but that is not so where the suit is commenced by an information and bill.

Mr. *G. Richards*, Mr. *Bethell*, Mr. *Willcock*, and Mr. *Hubback*, in support of the information and bill: The demurrers have been attempted to be supported on two grounds: the first is want of equity; and the second, misjoinder of parties.

The demurring parties are not the Coopers' Company, but the East India Company and their secretary. What right have those parties to endeavor to protect themselves by saying that the property does not belong to the charity, but to the Coopers' Company? Besides it appears, from the instrument set forth in

the information and bill, that the founder did not intend to benefit the Coopers' Company, but to devote the whole of the property to charitable purposes; for that instrument directs that: " the master, wardens, or keepers of the company for the time being, for their pains about performing the premises and viewing the tenements aforesaid, twice in the year, that they be in due reparation, may have, among themselves, for a drinking among the men of the mystery and company aforesaid 26*s.* 8*d.* yearly, that is to say, at the two times at which they *shall be viewing the tenements aforesaid, whether they [*385] are in due reparation or not, by equal portions." This direction is wholly inconsistent with the Coopers Company being entitled to the surplus rents.

The lease was granted for 260 years; and a court of equity will not uphold a lease of charity property, granted for anything like that length of time. *The Attorney-general* v. *Owen*;(*a*) *The Attorney-general* v. *Brooke*.(*b*) At all events, a lease of so long duration must be taken to be an improvident mode of dealing with the charity property, until the contrary is shown.

The other objection is that the parties who are plaintiffs, have no interest which entitles them to maintain the suit. But, supposing that to be so, the information may proceed, notwithstanding the Court may be of opinion that the bill is not sustainable. *The Attorney-general* v. *Vivian*.(*c*) The demurrers are demurrers to the information as well as to the bill; and, unless it can be shown that no relief can be given upon the information, the demurrer must fail.

We submit, however, that the parties who are named as plaintiffs on this record, have such an interest as entitles them to maintain the suit. Three of the plaintiffs allege that they are members of the court of assistants of the Coopers' Company, and that, as such members, they act as trustees of the charity, and are bound duly to administer the funds of the charity for the benefit thereof: and it is quite plain that the two other plaintiffs,

(*a*) 10 Ves. 555. (*b*) 18 Ves. 319.

(*c*) 1 Russ. 226.

one of whom is an almsman and the other an alms-
[*386] woman, have an *interest in the charity.—[THE VICE-CHANCELLOR: I do not understand the allegation to which you have alluded. If the three gentlemen who are first named as plaintiffs, are bound to administer the funds of the charity, why do they not do it? They are the governing body; then why does not the governing body govern?]—They are only members of the governing body: the court of assistants is the governing body. If an information only had been filed in this case, these three gentlemen would have had a sufficient interest to justify their being made defendants to it: how then can it be contended that they have not a sufficient interest to entitle them to join, with the Attorney-general, in filing an information and bill? The almsman and almswoman have a right to insist that their stipends (which were fixed at a time when the rents of the charity estates were much less than they are at present) ought to be increased: they, therefore, have been properly made co-plaintiffs. But if it was not necessary to make them co-plaintiffs, that circumstance does not invalidate the bill. *Rhodes* v. *Warburton*.(a)

Lastly, we submit that it was not necessary to make all the members of the court of assistants, parties to the record, it being quite sufficient, in a case of this sort, to bring before the court sufficient parties to represent the individuals interested in the revenues of the charity estates.

THE VICE-CHANCELLOR:—My opinion is that, as far as the charity is concerned, there is a sustainable case. But I cannot comprehend what particle of interest those three gentlemen have,
who are first named as plaintiffs on this record. The
[*387] *statement as to them, is very singular. It is that they are respectively members of the court of assistants of the Coopers' Company: it does not appear that there are more members of the court of assistants: "that the court of assistants is the governing body of the said company, and that

(a) Ante, Vol. VI. p. 617.

your last-named orators, as members of such court, act as trustees of the said charity, and are respectively bound to administer the funds of the said charity, for the benefit thereof." I do not see how persons can be bound to do what is impossible. If the plaintiffs represent that they are bound to administer, it must be taken that they can administer the funds of the charity: and, if so, I do not see for what purpose the record is framed as an information and bill: for there is not a particle of individual interest asserted in it. What is asked is, that it may be declared that the lease was obtained, from the Coopers' Company, by fraudulent means, and that the same may be declared to be fraudulent, and may be set aside for the benefit of the charity: and also that it may be declared that the execution of the lease, was a breach of trust on the part of the persons constituting the court of assistants of the Coopers' Company at the time; and that the same may be delivered up to be cancelled; and that the full annual improved value of the premises comprised in the lease, may be received, by the Coopers' Company, and applied and administered by them for the benefit of the charity; so that, on the face of this record, there is no sort of relief asked by the persons named as plaintiffs, none whatever: and, if those persons do not ask any relief for themselves individually, then there is the objection which has been made *ore tenus*, namely, that the other parties who stand in precisely the same character, ought also to be parties to the record.

*I think, however, that the record is wrongly con- [*388]
structed; because persons have been made co-plaintiffs, who have asked nothing for themselves, and do not show that they are individually entitled to anything.

The information and bill, therefore, cannot be sustained collectively: but, as there is, apparently, a case for relief, I will give leave to amend, for the purpose of converting the record into an information only. The persons, however, who are named as plaintiffs, must remain on the record in the character of relators, in order that they may be answerable for costs.

REES *v.* KEITH.

1840: 17th December.

A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other, to a trustee for her, married. The mortgagees having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred. Held, that he had reduced both sums into possession.

ELEANOR, the wife of W. Rees, was, at and before the time of her marriage, entitled to 450*l.* secured by a mortgage in fee made to her by R. Reeve; and also to 800*l.* secured by a mortgage in fee made, by S. Cushing, to P. Millard, in trust for her. The mortgagees having been applied to, by or on behalf of Mrs. Rees, shortly after her marriage, to pay the sums due from them respectively, but being unable to pay the same, Millard paid those sums to Mr. Rees: and Rees signed a memorandum whereby he agreed to transfer Cushing's mortgage to Millard. Mr. Rees afterwards died; and a suit having been instituted respecting his estate, the Master, on a reference made to him, [*389] found that the *payment of the 800*l.* to, and the signing of the memorandum by Rees, was a reduction by him, of that sum into possession; but that the payment of the 450*l.* to him, was not a reduction by him, of that sum into possession.

Rees's widow and his excutors, both, excepted to the report.

Mr. *Jacob*, Mr. *Koe*, and Mr. *Walker*, for the executors, said that this was not a suit between Mrs. Rees and Cushing, or between her and Reeve, but between her and her husband's estate, and that, for the purposes of this suit, it was quite clear that the 450*l.* as well as the 800*l.*, had been reduced into possession: that it was held, in *Doswell* v. *Earle*,(*a*) that even an anticipated payment to the husband, was good against the wife surviving.

(*a*) 12 Ves. 473.

1840.—Rees v. Keith.

Mr. *Wigram* and Mr. *Lovat*, for Mrs. Rees, said that the debts still remained due from the debtors respectively; that Mr. Rees had no power to reduce either of them into possession during the coverture, as he could not have compelled the mortgagors to pay the sums due from them, without giving a re-conveyance of the mortgaged estates, which it was not in his power to do, as he could not have compelled his wife to join with him in levying a fine for that purpose: *Purdew* v. *Jackson*;(*a*) *Honner* v. *Morton*.(*b*)—[THE VICE-CHANCELLOR: Suppose that the mortgagors had paid the sums due from them, to the husband.]—They might have sustained a bill, against the husband and wife, for a *reconveyance; but the husband could not have compelled his wife to join in a reconveyance; and, besides, no payment has been made by either of the mortgagors. The debts were due at the husband's death, and they still remain due from the debtors. If a suit had been instituted to compel the wife to join in reconveying the estates, she would then have been able to enforce her equity to a settlement out of the sums due on the mortgages; but, if the argument for the executors is to prevail, the wife will be deprived of the means of enforcing her equity. In *Doswell* v. *Earle*, the widow had acquiesced, for nine years after her husband's death, in the payment which had been made to her husband; but, in this case, there has been no acquiescence on the part of the widow. [*390]

THE VICE-CHANCELLOR, in the course of the argument, said that the subject in dispute was a debt due to the wife; and, if it had been paid, there was an end to the claim; that the only question was whether the 800*l*., as well as the 450*l*., had not been paid, in fact, by Millard, for the mortgagors.

His Honor delivered judgment as follows:

This is a very simple point. Suppose that the mortgagor had said, to Mr. Rees: "I owe your wife 800*l*.: here is a cheque for the money." Would not the debt be destroyed; and would not the wife be a mere trustee of the legal estate for the mortgagor?

(*a*) 1 Russ. 1. (*b*) 3 Russ. 65, sec. 68 & 69.

If a contrary doctrine were held, a mortgage in fee made to a woman who afterwards marries, could not be paid off during the coverture.

[*391] *It seems to me, I confess, that, if the debt is paid, there is an end to the wife's equity.(*a*)

TAYLOR *v.* RUNDELL.

1840: 21st December.

A. B. and C. were members and three of the directors of a mining company, and also lessees, in trust for the company, of mines in Nova Scotia, under a lease by which a portion of the profits was reserved to the lessor. The lessor's executors filed a bill against A. B. and C., for an account of the profits of the mines, and required them to set forth a list of all accounts, &c., relating to the mines in the possession of them or their agents. The defendants set forth a list of all the accounts in the possession of themselves and of the secretary of the company in London, adding that there were other accounts in the possession of the company's agent in America; that the defendants had no power to inspect or use the accounts of the company, except when sitting at the board of directors, or by an order of the board; and that they had not the permission of the board to use the accounts for the purposes of the suit, and they believed that the directors declined to allow them to use the same, or to give them any further information which might enable the plaintiffs to prosecute the suit. Held that the answer was insufficient, as it did not state that the defendants had, as they lawfully might, applied to the agent in America for a list of the accounts in his possession.

THE plaintiffs were the executors of the late Duke of York. The defendants were members and three of the directors of a mining association, and were also lessees, in trust for the association of mines in Nova Scotia.(*b*) under a lease granted by the Duke, reserving to himself, his executors, &c., a portion of the profits of the mines. By the covenants in the lease the defendants were bound to render to the Duke, yearly, such accounts as should be necessary to show the profits of the mines, and to

(*a*) See *Bosvil* v. *Brander*, 1 P. W. 458.

(*b*) These mines had been the subject of a suit between the Duke's executors and the Attorney-general, as representing the Crown. See ante, Vol. 8, p. 413.

appoint a person, to be nominated by the Duke, to be a director of the association, and to *allow him to sit at [*392] the board and to have all the other powers and privileges of a director, for the purpose of protecting the Duke's interest: and, shortly after the execution of the lease, a gentleman named Parkinson, was nominated and appointed accordingly. The bill was filed for an account of what was due, to the Duke's estate, under the reservation in the lease. It interrogated the defendants whether there were not in the possession of themselves or their agents, and, especially, of their agents in America, divers accounts, &c., relating to the produce and profits of the mines.

The defendants annexed two schedules to their answer, which they said contained a full and true list of all the accounts, &c., in their possession or power, or in the possession or power of the secretary to the association in London. They added that the secretary was the agent of the association, and not their agent; and that they had no agent in America; but they believed that the association had an agent there, and that he had, in his possession, many accounts, &c., relating to the matters in question; but, inasmuch as he was in the habit of transmitting, monthly, to the secretary to the association in London, copies of all the accounts and other documents relating to the mines, they believed that the documents in the secretary's possession (which were mentioned in the second schedule,) would furnish all the information that could be obtained by inspecting the documents in the possession of the agent in America: that the defendants, being engaged in extensive mercantile concerns of their own, had paid but little attention to the affairs of the association; and that, save as therein set forth, they had no knowledge, other than was contained in the documents mentioned in the schedules, of any matters connected with the mines: that, in fact, the *documents mentioned in the second schedule, were [*393] not in the possession or power of the defendants, in any other sense than that they and the other directors, including Parkinson, when assembled as a board, were competent to order the same to be used and inspected by a vote of the board; that

they had no authority to make use of those documents as individuals, except by an order of the board, and except that, under the co-partnership deed, they had a right, in common with the other members of the association, to inspect and take copies of those documents, from the 14th to the 35th day after every general yearly meeting of the association, but not after that period: that Parkinson had the same opportunities of inspecting and using the documents as they had: that they had not the permission of the directors to have or use the documents for the purposes of the suit; but, on the contrary, the directors declined to allow them to use the documents, or to give them any further information which might enable the plaintiffs to prosecute the suit against them (who were mere trustees,) without bringing the other members of the association before the Court.

The Master having over-ruled exceptions taken to the answer for insufficiency, the plaintiffs excepted to his report.

Mr. *Knight Bruce*, Mr. *Wigram*, Mr. *Jacob*, and Mr. *James Russell*, for the plaintiffs:—The defendants say they believe that the American agent of the association, of which they are directors, has, in his possession, many documents relating to the accounts of the mines; but they do not say that they have ever applied, to him, for any information as to *those documents or their contents. They are bound to obtain all the information in their power, and to communicate it to the plaintiffs.

[*394]

Mr. *Wakefield*, Mr. *Bethell*, and Mr. *Wood*, for the defendants:—The answer states, expressly, that the defendants have paid but little attention to the affairs of the association, and that, save as therein set forth, they have no information whatever, other than is contained in the documents mentioned in the schedules, as to any matters connected with the mines. The agent in America, is not the agent of the defendants, but of the association at large; and, consequently, the accounts in America are not in the possession or power of the defendants, but of the association as a body. The defendants have no access to any of the accounts

except for 21 days after every general, yearly meeting. This Court will not order a party to do that which it is not in his power to do. Besides, Mr. Parkinson was appointed a director on the nomination of the Duke, and for the express purpose of watching over and protecting the Duke's interests. That gentleman has the same means of obtaining information as to the concerns of the association, as the defendants have. The defendants are trustees for the association, as well as directors of it: will the Court order them to do an act which would be a breach of their duty and a violation of the rules of the association prescribed by the co-partnership deed? The plaintiffs cannot obtain any further information as to the matters in question, without making all the other members of the association parties to the suit. *Farquharson* v. *Balfour*;(a) *White* v. *Williams*;(b) **Freeman* v. *Fairlie*;(c) *Walbourn* v. *Ingilby*;(d) *Murray* v. *Walter*.(e) [*395]

Mr. *Knight Bruce*, in reply, said that the cases cited related to the production of documents: that the question before the Court, was not whether the plaintiffs had a right to the production of the accounts of the mines, but whether they had a right to a discovery of the contents of those accounts: that a party might have a right to know the contents of a document, though he might not be entitled to have the document produced.

THE VICE-CHANCELLOR:—I am of opinion that the answer is not sufficient.

The defendants, as directors, are not placed in a position in which they may not legally require the agent of the association abroad to inform them what documents, relating to the concerns of the association, are in his possession or power. They state, in their answer, that copies of some of the foreign documents, have been transmitted to the secretary to the association in Lon-

(a) Turn. & Russ. 184.
(b) 8 Ves. 193.
(c) 3 Mer. 29; see 43 and 44.
(d) 1 Myl. & Keen, 61.
(e) 1 Craig. & Phill. 114.

don, and they set forth a list of them. Then, without stating that they have made any application to the agent abroad, they content themselves with saying that he has in his possession many books of account and other documents relating to the accounts of the mines, and also some deeds relating to the title to the mines: and that the secretary receives, monthly, from the agent abroad, copies of all the accounts and other documents of interest or importance, relating to the mines: but it [*396] does not appear that the defendants have made any *application, to the agent abroad, to furnish them with a list of the deeds and documents which may be in his possession.

I am not aware of anything which prevents any of the directors from requiring the agent to furnish them with the information which the plaintiffs seek to obtain through the defendants: and as the defendants do not state that they have applied to the agent abroad, for the information, (which they may lawfully do,) the exceptions must be allowed.(*a*)

(*a*) Affirmed by Lord Cottenham, C. 1 Craig. Phill. 104. See *Christian* v. *Taylor*, post, 401.

*Bain *v.* Lescher [*397]

1840: 24th December.

Testator directed his residue to be divided amongst the children of L. D., to wit, J. D., E. D., and A. D. Held that the gift was not made to the children as a class, but as individuals; and that one of them having died in the testator's lifetime. the share intended for that child was undisposed of.

Testator directed that the legacies given, by his will, to females, married or single, should be for their own benefit and their children, and should never be subjected to the control of their respective husbands. Held that the females took for their lives, for their separate use, with remainders to their children.

A British subject resident in France, made his will and died there, having appointed A. and B., who were resident in France, and C. and D., who were resident in England, his executors. The will was translated into French, and the translation was registered, by A. and B., in the proper court in Paris. A duly authenticated copy of the translation was then procured, and translated into English by a notary public in London; and that translation was proved by C. and D. in the Prerogative Court.

The testator in the cause, was a British subject, resident in France, and having personal property in that country, as well as in England. His will was, partly, in the following words:

"I, the undersigned, John Devereux, formerly resident at Moorfields, London, and now at Avenue de Neuilly, near Paris, make my present testament and last will, by which I revoke all testaments and wills that I have heretofore made, and dispose of my property in the manner following, to wit, I give and bequeath 100*l.* sterling to each of my sisters in Ireland, who shall be living at the time of my decease: to Mr. Nicholas Devereux of Castlebridge, near Wexford in Ireland, 50*l.* sterling: to Mrs. Louisa Langton Drew of Paris, 1,000*l.* sterling: to Alexander and Napoleon Lariviere, sons of Madame Louise Lariviere, whom I hereby nominate and constitute as their guardian till *their majority, 500*l.* sterling each. I give [*398] and bequeath all the rest of what I possess to be divided, in equal portions, amongst the children of the said Louisa Langton Drew, to wit, John Louis Drew, Louisa Lariviere, Julia Bain, Isabella Agnes Drew, Edward Alexander Drew and Na-

poleon Drew. It is my wish that all my property be immediately converted into money; that the shares of those who shall be of age, shall be given to them without delay, and that the shares coming to the minors, be placed in the public funds of Paris or London, as shall be most convenient for the testamentary executors; and, till they become of age, I hereby nominate and appoint my testamentary executors hereinafter mentioned, as guardians and trustees of the said minors, during their minority: And I direct that the legacies given, by the present will, to females, married or single, shall be for their own benefit and their children, and shall never be subjected to the control of their respective husbands. I hereby nominate and appoint Madame Louisa Lariviere, Thomas Pickford, Britannic consul at Paris, M. O'Maly, Esq., residing at No 5 Rue du Faubourg St. Honore, and William Lescher, Esq., of Thomas-street, Whitechapel, London, as executors of my present testament and last will."

John Louis Drew died in April, 1837. The testator died in April, 1838. Julia Bain had one child, and Louisa Lariviere had two children born at the testator's death, and still living.

A French translation of the will was first registered, in the proper Court in Paris, by Pickford and O'Maly. A copy of that translation was then made and signed by a notary in Paris: and Pickford, as British consul there, certified that the [*399] signature was the signature of *the notary. An English translation of the copy, was then made by a notary public in London; and that translation was proved, by Lescher and Louisa Lariviere, in the Prerogative Court of the Archbishop of Canterbury.(*a*)

The bill was filed by Julia Bain, by her next friend, and by Isabella Agnes Drew, Edward Alexander Drew and Napoleon Drew, against William Joseph Lescher, Louisa Langton Drew, Louisa Lariviere and her two children, the husband and child of Louisa Bain, and the testator's next of kin.

(*a*) The reporter was informed that the Prerogative Court refused to admit to probate the original will, which was written, in English, by the testator himself.

1840.—Bain v. Leecher.

On the cause coming on to be heard for further directions, the questions were:—First, whether the share of the residue given to John Louis Drew, (who died in the testator's lifetime,) was undisposed of, or whether his surviving brothers and sisters were entitled to it.

Secondly, what was the effect of the direction that the legacies given to females, should be for their own benefit and their children, and should never be subjected to the control of their respective husbands.

Mr. *Knight Bruce* and Mr. *Stephenson* for the plaintiffs:—The residue is given to the children of Louisa Langton Drew, as a class. It is true that the testator names *the children; but that makes no difference. *Knight* v. *Gould*;(a) *Vinner* v. *Francis*.(b) [*400]

Secondly: The direction as to the legacies given to females, is nothing but a redundant and circuitous mode of excluding the marital right. Some of the legacies given to females are only 100*l.* in amount. The testator could not intend that such small sums should be settled on the legatees and their children. *Robinson* v. *Waddelow*;(c) *Cooper* v. *Thornton*;(d) *Robinson* v. *Tickell*;(e) *Shuttleworth* v. *Greaves*.(g)

Mr. *Jacob* and Mr. *Heathfield*, for the children of Julia Bain and Louisa Lariviere, contended that the children took either as joint-tenants with their mothers, or in remainder after the deaths of their mothers.

Mr. *G. Richards* and Mr. *Piggott*, for the testator's next of kin, said that the residue was given to the children of Louisa Langton Drew, not as a class, but *nominatim*, as individuals, and, consequently, that the share given to John Louis Drew had become undisposed of.

(a) 2 Myl. & Keen, 295.
(b) 2 Cox, 190.
(c) Ante, Vol. VIII. p 134.
(d) 3 Bro. C. C. 96 & 186.
(e) 8 Ves. 142.
(g) 4 Myl. & Cr. 35.

Mr. *Bagshawe* appeared for the defendant Lescher.

THE VICE-CHANCELLOR:—The residue is given to the children of Louisa Langton Drew, not as a class, but as individuals; for the testator names them.

[*401] *With respect to the construction which ought to be put upon the discretion as to legacies given to females, I think that the sentence ought to be read as if the words, "married or single," were omitted; for all females must be either married or single. The direction will then be, that the legacies shall be for the benefit of females, and for the benefit of the children of females: and my opinion is, that the construction which ought to be put upon those words, is, that the females take their legacies and shares of the residue for their lives, with remainders to their children, and, under the words that follow, for their separate use.

CHRISTIAN *v.* TAYLOR.

1840: 18th and 19th December. 1841: 12th January.

A defendant who is required to set forth accounts, is bound to set them forth as well as he is able, without much labor or expense, and he is not bound (more especially where he has not been a party to the transactions, but is only the representative of a party, and the accounts are long and complicated) to refer to the books for the purpose of making out the accounts. He must, however, allow the plaintiff to inspect the books.

Where the documents of which a defendant is required to set forth a list, are numerous, it is not necessary for him to specify each of them; but it is sufficient for him to describe them, so as to enable the plaintiff to move for them; as, for instance, to say that they are contained in bundles or hogsheads, sealed up, and marked A, B, &c.

P. M. CALLOW and Richard Taylor, both deceased, had carried on the business of wholesale grocers at Liverpool, in co-partnership, from 1799 until the 20th of December, 1832; and, during that time, had speculated, extensively, in cotton and other colo-

nial produce, on their joint account. On the 20th of December, 1832, the partnership was dissolved, and Callow sold and *assigned his share of the business to Thomas and [*402] William Taylor, two of Richard Taylor's sons. Callow died in February, 1833, intestate, and, in April following, the plaintiff, his sister, took out administration to his estate. Thomas Taylor died in March, 1836, and William Taylor took out administration to his estate. Richard Taylor died in June, 1837, having appointed his sons William and John, the defendants, his executors.

The bill was filed in November, 1838, praying that the deed of dissolution and assignment might be declared to be fraudulent and void; that an account might be taken of the partnership dealings and transactions, so as to ascertain what was due to Callow, on the 20th of December, 1832; that an account might be also taken of what was due, on the same day, to him in respect of the speculations, and of what had since become due, to him and his estate, in respect of the profits which had been made by carrying on the grocery business; and that what should be found due on taking those accounts, might be paid out of the assets of Thomas and Richard Taylor and by the defendant, William Taylor, according to their respective liabilities; and that the assets and effects of the grocery business might be sold, and the proceeds applied in paying, to the plaintiff, what should be so found due.

The bill required the defendants to set forth, with great minuteness and particularity, several accounts relating to the matters in question, and, amongst them, an account of the profits of the partnership, made in every year from its commencement until its dissolution; and also a full, true and particular account of all joint speculations in the purchase of cotton, colonial produce and other merchandize into which Callow and Richard Taylor *had entered, and the quantity of [*403] merchandize purchased on the occasion of each of the speculations, and the prices paid, and in what shares the parties contributed to the purchase moneys respectively, and the dates and amounts of each contribution, and from what sources the

purchase-moneys were derived, and when and at what prices the merchandize was, on each occasion, sold, and what was the profit and loss on each speculation, and how the moneys arising from the sale of the merchandize, was, on each occasion, applied, and to whom it was paid. The bill also required the defendants to set forth a list of all the books, papers and accounts, relating either to the grocery business or to the speculations, which then were or ever had been in their possession.

The defendants, in their answers, said that they could not set forth the accounts, from their knowledge, remembrance, information or belief: and that they could not make out the accounts, without incurring a ruinous expense and loss of time; that an accountant, whom they had employed, had been unable to do more, in six weeks, than to make out the accounts in the manner required, for a space of time less than a year; and that they were ready and willing, and thereby offered to allow the plaintiff to inspect the books, &c., of the late partnership at their counting-house, and to furnish him, at his own expense, with any copies of or extracts from the same: that they had set forth a list of books, papers and accounts, in their possession, relating to the matters in question, and that they also had, in their possession, three hogshead, sealed up, containing old papers, consisting of invoices, orders for goods, letters, &c.; that, to specify the documents contained in the hogsheads, would occupy a schedule of
[*404] enormous length, and consume many weeks and *more time than they had been allowed for putting in their answer;(*a*) but they were ready to deposit the hogsheads with their elerk in Court, to afford the plaintiff an opportunity of inspecting the documents therein contained.

The Master having reported the answers to be insufficient, the defendants excepted to the report.

Mr. *Knight Bruce* and Mr. *Walker*, in support of the exceptions:—The plaintiff, in requiring the defendants to set forth the

(*a*) This seems to be a reason for applying for further time to answer, rather than for not setting forth a list of the documents.

long and complicated accounts to which the exceptions relate, is attempting to make a most unjust and oppressive use of the orders of the Court. The defendants say that, if they shall be compelled to make out the accounts, they shall incur such an expense and loss of time, as will be their ruin. In point of fact, they have answered, fully, to the matters excepted to; for they say that they cannot set forth the accounts according to their knowledge, information and belief; and that the books, which they offer to allow the plaintiff to inspect, will furnish all the information required. The defendants were not engaged in any of the speculations or other transactions to which the bill relates; nor did they keep the accounts; and, as they offer to permit the plaintiff to inspect the books, he has the same means as they have, of obtaining all the information that he requires. *Seeley* v. *Boehm*(*a*). Secondly: There is a full answer as to every document except those *contained in the three [*405] sealed hogsheads. It is every day's practice, in setting forth a list of documents, to specify those that are most important, and to add that there are others tied up in bundles, marked *A*, *B*, &c., and to offer to produce them. The only question is, whether the documents are sufficiently identified, in order to enable the plaintiff to move for the production of them; and we submit that, in this case, the documents are sufficiently described for that purpose.

THE VICE-CHANCELLOR: I have always understood the rule to be that a defendant, with regard to transactions that are not his own, is not bound to find out information for the purpose of communicating it to the plaintiff. In this case, the defendants are merely the executors of Richard Taylor, who was co-partner with Callow, whom the plaintiff represents. If they had said that they had never looked into the partnership-books, and that they did not mean to look into them, I apprehend that no objection could be made to the answer in point of form. What obligation is there, on the defendants, to go through the books, for the purpose of giving the plaintiff the information which he asks?

(*a*) 2 Madd. 176.

Mr. *Jacob* and Mr. *James Russell*, for the plaintiff, relied on *White* v. *Williams*,(a) and said that the account of the yearly profits of the partnership business, which the defendants were required to set forth, would not consist of more than 32 items.

Mr. *Knight Bruce* in reply :—In *White* v. *Williams* the questions related to certain payments made by the trustees themselves.

[*406] *THE VICE-CHANCELLOR :—As I collect from *White* v. *Williams*, the defendants did not refer to the documents in such a manner as to enable the plaintiff to move for them. It has been the habit, ever since I have been in the profession, for a defendant, who is required to set forth a list of documents in his possession, to specify those that are most important, and then to say that there are others contained in bundles marked so and so : and I cannot but think that, if a defendant says that there are documents contained in hogsheads which are marked and sealed up, it is a sufficient description of them. Before, however, I decide the questions that have been raised, I will compare, very minutely, the interrogatories with the answers to them.

1841 : 12*th January*.—THE VICE-CHANCELLOR :—Since this case was argued, I have had an opportunity of comparing the answers with the exceptions; and my opinion is, that I ought to hold the answers to be sufficient.—[His Honor here stated the facts of the case.]—The object of the bill is to show that the transaction with regard to the dissolution of the partnership, was unfair; and, for that purpose, it is evidently important to show the amount of the profits of the partnership, down to the time of the dissolution. It must be observed, however, that the defendant, William Taylor, had nothing to do with the business until after the dissolution : and the defendant, John Taylor, who is merely a personal representative of one of the deceased co-partners, cannot be assumed to have any greater degree of knowledge with respect to the profits of the partnership, than the plaintiff,

(a) 8 Ves. 183.

who is the personal representative of the other co-partner, has. The *partnership subsisted for a period of 32 years; and it appears, from the answers, that it has required great labor and expense to make out an account of the nature required, for a few months only of that period. [*407]

In *White* v. *Williams*, the bill was filed by the plaintiff, as heir at law and devisee of his father, against trustees under a conveyance, by the father, of estates in the West Indies, alleging that the trusts were all satisfied, and praying for a re-conveyance and an account and payment of all sums due, from the defendants, on account of the trust. Lord Eldon, C., in his judgment said: "It is not sufficient for the trustees to refuse to give information by their answer, further than to enable the plaintiff to go into the Master's office; and it is not enough that the answer gives a ground for an account in the master's office, and that the plaintiff is enabled to go there; but they are bound to give the best account they can, by their answer referring to books, &c, sufficiently to make them part of their answer. The Court would consider the trustees as giving the information very oppressively, if they were to set forth a schedule with reference to transactions for 20 years together: but it requires them to refer to books, to give all convenient opportunity of inspection, and to refer to them so as to make them part of the answer, and so as to ascertain whether that is the best account they can give. The plaintiff has a right to compel them, by their answer, to say that is the best account they can give. * * * * As to all the exceptions that go to the point of setting out the totals, the Master is right: but I give no opinion whether the trustees are bound to state them otherwise than thus: that they have laid the accounts, from which the totals will appear, in the Master's office; and that those *accounts enable the plaintiff to learn as much as they themselves know of them. [*408]

Now, in the present case, the answers state that the defendants have attempted to make out the accounts in the manner in which they are sought to be obtained, and that they are not able to ren-

der such accounts, at least without subjecting themselves to so much inconvenience and expense as would operate very oppressively upon them. They then refer to the books and documents in which the particulars of the accounts are to be found, and give the plaintiff the opportunity of making them out, as fully as they could do themselves: and it seems to me that, according to the observations of Lord Eldon in *White* v. *Williams*, they ought not to be required to do more.

The second question is with respect to the documents. The defendants are asked, in the usual terms, to set forth a list of of the documents, in their possession, relating to the matters in the bill: and, in compliance with that requisition, they state that they have, in their possession, three hogsheads, sealed up, containing old papers, consisting of invoices, order for goods, &c. Then they add, that to specify the documents contained in the hogsheads, would occupy a schedule of enormous length, and consume many weeks, and more time than they had been allowed, by the Master, for putting in their answer. With respect to this part of the case, I have always understood the practice to be to refer to documents as contained in bundles or boxes, or to give some other description of them of the like nature: and if they are so described as to enable the plaintiff to move for the production of them, the answer has been always, as far as my experience goes, held to be sufficient. In [*409] *this case I think that the documents in the hogsheads are sufficiently described to enable the plaintiff to obtain a production and inspection of them; and, consequently, the defendants are not bound to set forth a list of them.

The result is that the answers are sufficient in both particulars, and the exceptions to the Master's report must be allowed.

1840.—Meux v. Smith.

——— *v.* CHRISTOPHER.(*a*)

1841: 12th January.

A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file.

MOTION to take the bill, (which was a bill of interpleader,) and the affidavit annexed to it, off the file, on the ground that the plaintiff, who was a marksman, had subscribed his name to it, his hand having been guided on the occasion. The jurat was in the form applicable to the signature of a name at length.

Motion granted.

Mr. *Knight Bruce*, for the motion.

Mr. *Stephenson*, contra.

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*MEUX *v.* SMITH. [*410]

1840: 16th December. 1841: 17th, 24th, and 26th March. 1843: 17th January.

G., a publican, agreed to sell his public-house (which M. & Co. supplied with beer) to A. A. being unable to pay the whole purchase-money, M. & Co., at his request, agreed to pay to G. 1,000*l.*, part of it. At a meeting of the parties for completing the purchase, M. & Co. paid the 1,000*l.* to G. G. then executed the conveyance of the house, and immediately afterwards delivered it to M. & Co.; and A. signed a memorandum expressing that he had deposited the deed with M. & Co., for securing, by way of equitable mortgage, the payment to them of the 1,000*l.* Shortly afterwards, M. & Co. discovered that A. was an uncertificated bankrupt. Held, nevertheless, that they had, as against A.'s assignees, a lien on the deed for the 1,000*l.*

THE plaintiffs carried on the business of brewers, in co-partnership together, in Tottenham-court Road, Middlesex, under the firm of Sir Henry Meux & Co.

In September, 1838, one Gurney was possessed of a public-house, called The Dolphin, situate in Whitechapel-road, Middle-

(*a*) *Ex relatione.*

sex, for a term of 63 years, commencing from midsummer, 1838, in which he had, for some time, carried on the business of a publican; and, on the 13th of that month, he was indebted to the plaintiffs in the sum of 1,000*l.* and upwards, for beer sold and delivered, by the plaintiffs, to him. On the same day he was also indebted, to an amount exceeding 1,000*l.*, to Seager, Evans & Co., who were distillers at Millbank, Westminister.

Upon the sale of a public-house by the occupying publican, it is the practice for the vendor to pay the debt due to the brewers who serve the house, out of the purchase-money; and, as it often happens that the purchaser has not the means of paying the whole of his purchase-money, an application is usually made either by him, or by the vendor for him, to the brewers, to advance the amount required to make up the purchase-
[*411] money, upon the security of the premises agreed to *be purchased, and to pay the same to the vendor; and, if the brewers comply with the request, they, at the time fixed for the completion of the purchase, give, immediately to the vendor, a cheque, drawn upon themselves at their place of business, for the amount, and, after the completion of the purchase, the cheque is presented, by the vendor, at the house of business of the brewers: and the vendor receives payment of the cheque by having the amount of it written off the amount of the debt due from him to the brewers; and, upon the delivery of the cheque to the vendor, the vendor delivers, immediately, to the brewers, the title-deeds, including the conveyance, of the public-house; and the deeds are held, by the brewers, until the re-payment of the sum advanced by them, with legal interest: and it is also usual for the brewers to take, from the purchaser, a memorandum signed by the purchaser, whereby he agrees that the deeds shall be deposited, with the brewers, as a security, not only for the sum paid by them in part of the purchase-money and the interest thereof, but also for all other sums which may become due to them, from the purchaser, in respect of his dealings and transactions with them in the course of his business. On some occasions the sum necessary to make up the deficiency of the purchase-money is advanced, in shares previously agreed on, by

the brewers and by the distillers who have served or are intended to serve the house; and the brewers and the distillers agree that their respective debts shall not have priority one over the other, and, in such case, the deeds and memorandum are delivered to and remain with either the brewers or the distillers, but on behalf of both; and the debts, when paid, are paid *pari passu*.

*Shortly before the 13th of September, 1838, Gurney [*412] contracted, with Leonard Albin, to sell to him the public-house called The Dolphin, and, for that purpose, to grant a lease of it to him for the whole of the term of 63 years, wanting ten days, at the yearly rent of 102*l.* 10*s.*, in consideration of 2,450*l.*; but Albin not being able to pay more than 450*l.* of the purchase-money, he and Gurney went together to the plaintiffs' brewery, and Gurney then informed the plaintiffs that he was about to sell the public-house to Albin, and that Albin was unable to advance the whole of the purchase-money; and Albin, thereupon, requested the plaintiffs to pay, to Gurney, the sum of 1,000*l.*, part of the purchase-money, and made a similar request to Seager, Evans & Co.; and the two firms agreed to comply with the requests made to them respectively.

Gurney also agreed to sell, to Albin, all his furniture, stock in trade and fixtures in the public house, at a fair valuation; and the same were accordingly valued at 500*l.*

On the 13th of September, 1838, which was the day fixed for the completion of the purchase, Charles Callow, the agent of the plaintiffs, met Gurney and Albin, and the agent of Seager, Evans & Co., at the public-house, for the purpose of completing the purchase; and Callow, in payment of the 1,000*l.* which the plaintiffs had consented to pay as before mentioned, then gave to Gurney a cheque for that sum, drawn by him upon the plaintiffs and made payable to Gurney. On the following day, Gurney presented a cheque at the plaintiffs' brewery, for payment; and the plaintiffs wrote the amount of it off the debt due from him to them. Seager, Evans & Co., *paid, in like [*413] manner, to Gurney, the 1,000*l.* which they had consented to pay; and Albin paid the rest of the purchase-money, and

also the sum at which the furniture, stock in trade, and fixtures had been valued. Gurney, on the cheques being delivered, and and the payments being made to him, executed an indenture, dated the same 13th of September, whereby he demised the public-house to Albin, for the terms agreed upon; and, at the same time, he delivered, to Albin, possession of the furniture, &c. Immediately upon the execution of the lease, and in pursuance of the before-mentioned arrangement, Gurney delivered the lease to the clerk of the plaintiffs' solicitors, as the agent, and on behalf of the plaintiffs, and the same was retained, by the solictors, for a short time, for the purpose of being registered in Middlesex, and was then deposited in the strong room at the plaintiffs' brewery.

The bill alleged that, under the circumstances aforesaid, the plaintiffs became entitled to a lien, upon the public-house, for the 1,000*l.* paid by them, and the interest thereof; and that the lease was delivered to, and was held by them, as well on behalf of themselves and in respect of their lien, as on behalf of Seager, Evans & Co., and in respect of their lien upon the premises for the 1,000*l.* paid by them, and the interest thereof.

Albin being desirous that the plaintiffs and Seager, Evans & Co., should supply him with goods for the purposes of his business of a licensed victualler and publican, the two firms agreed to do so upon the usual terms; and they requested Albin to sign and give to the plaintiffs, on behalf of themselves and Seager, Evans & Co., a memorandum of the deposit of the lease, which was to operate by way of further security for the
[*414] two *sums of 1,000*l.*, and also for any debts which might accrue due, from Albin, to the two firms respectively, in consequence of their dealing with him in his trade. Accordingly Albin signed and gave to the Plaintiffs, on behalf of themselves and Seager, Evans & Co., a memorandum dated the 13th day of September, 1838, in the words following: "Memorandum—I have this day deposited, with Sir Henry Meux & Co., the lease of The Dolphin public-house, Whitechapel Road, for securing, on demand, the re-payment to them of the sum of 1,000*l.*, and, to Messrs. Seager, Evans & Co., the

sum of 1,000*l.*, now respectively lent and advanced by them to me, with interest thereon respectively at five per cent. per annum from the date thereof, and also for securing, unto the said Sir Henry Meux & Co., and Messrs. Seager, Evans & Co., respectively, or the partners for the time being constituting their respective firms, the payment of all such other debts and sums of money as shall, at any time hereafter, become due and owing from me, to the partners for the time being constituting the said firms respectively, for goods sold and money lent, or upon any other account whatsoever: and I undertake and agree, on demand and at my costs, to execute unto Sir Henry Meux & Co., and Messrs. Seager, Evans & Co., or the partners for the time being constituting the said respective firms, or to such person or persons as they shall direct, an underlease of the premises comprised in the said lease so deposited as aforesaid, for such term as they shall respectively think fit, not extending to the whole term for which I hold the same; such underlease to be granted at the yearly rent of a peppercorn, by way of mortgage for securing the payment of the moneys and interest so intended to be secured as aforesaid, and with such powers of sale, and such powers of giving receipts and discharges to purchasers, and other clauses and *provisions incident thereto as [*415] the said Sir Henry Meux & Co., and Messrs. Seager, Evans & Co., or the partners for the time being, constituting their respective firms as aforesaid, may think fit: and I declare that the said Sir Henry Meux & Co., and Messrs. Seager, Evans & Co., respectively, or such partners for the time being as aforesaid, shall be entitled to and have a lien upon the said lease so deposited as aforesaid (but not an assignment of the whole of my term and interest therein) until the whole of the moneys and interest intended to be secured as aforesaid, shall be fully paid and satisfied: and, lastly, for the considerations aforesaid, I hereby undertake and agree, so long as I shall be indebted upon the security aforesaid, not to make or execute any transfer, assignment or other disposition, either absolutely or conditionally, of the legal estate of or in the said premises or in any part thereof to any other person than the said Sir Henry Meux & Co., and

Messrs. Seager, Evans & Co., or their respective firms for the time being."

Although it was expressed, in the memorandum, that Albin had deposited the lease with the plaintiffs, yet, in fact, the lease never was in his hands or possession, but the same was delivered to or deposited with the plaintiffs, by Gurney, in the manner and under the circumstances before mentioned. Albin, upon the execution of the lease, entered into possession of the public-house and premises.

Shortly before the end of 1838, the plaintiffs, for the first time, discovered that in June, 1837, a fiat in bankruptcy was issued against Albin (who was then a wine and spirit-merchant at Liverpool,) under which he was declared a bankrupt, and
[*416] that the defendants John *Smith, John Reckless and David Hart were appointed assignees of his estate, and that Albin had never obtained his certificate. On making that discovery, the plaintiffs and Seager, Evans & Co., proceeded to take steps for enforcing their lien upon the Dolphin public-house; and, in August, 1839, they entered into a treaty, with one Thorn, for the sale of it to him for 2,200*l.*: but, before they made any contract with Thorn, they informed the assignees of all the circumstances of the case, and made certain arrangements with them, the result of which was that, by an indenture dated the 7th of September, 1839, and made between the assignees of the first part, the plaintiffs and Seager, Evans & Co., of the second part, and Thorn of the third part, after reciting the lease of the 13th of September, 1838, and that 2,000*l.*, part of the consideration money of 2,450*l.* expressed to have been paid by Albin to Gurney, was, in fact, paid to Gurney by the parties thereto of the second part in equal moieties, and that the recited indenture of lease was, thereupon, delivered to those parties, and that they then held the same as a security for the 2,000*l.* and interest, and that they were entitled to a lien, upon the indenture of lease, for 2,000*l.* and interest, as purchasers to that extent, and that the 2,000*l.* was still due and owing to them with interest from the 13th of September, 1838, and that Albin, at the time of granting the lease, was and still remained an uncer-

tificated bankrupt, by reason whereof the lease became the property of and was then legally vested in the parties thereto of the first part as Albin's assignees, subject nevertheless to the lien for the 2,000*l.* and interest, and that the last mentioned parties, as such assignees, had taken possession of the premises demised by the lease, and that Thorn had agreed, with them, for the purchase of the premises *for the residue [*417] of the term of 63 years less 10 days for 2,200*l.*, and that it had been agreed, between the several parties thereto, that 2,100*l.*, part of the 2,200*l.*, should be paid to the parties thereto of the second part, in full satisfaction and discharge of their aforesaid lien, and that, in consideration thereof, they had agreed to join in releasing the premises in manner thereinafter contained: It was witnessed that, in consideration of 1,050*l.* paid, by Thorn, to the plaintiffs, and of 1,050*l.* paid by him to Seager, Evans & Co., and of 100*l.* paid by him to Smith, Reckless & Hart, they and the parties of the second part, assigned and released respectively the public-house to Thorn for the residue of the term of 63 years wanting 10 days.

The sums of 1,050*l.*, 1,050*l.* and 100*l.* were paid by Thorn, according to the tenor of the assignment; and, upon the execution of it, the plaintiffs delivered to him the lease of the 13th of September, 1838. Although the assignment was dated as above, yet, in fact, it was not executed until the 9th of November, 1839, previously to which day, namely, on the 24th of September, 1839, a memorandum was signed by the plaintiffs and Seager, Evans & Co., and by Smith, Reckless & Hart, in the words following: "Memorandum—That although Messrs. John Smith, John Reckless and Daniel Hart, assignees of Leonard Albin an uncertificated bankrupt, have, at the request of the other parties to a certain indenture not yet executed bearing date the 7th day of September instant, and made between the said assignees of the first part, Sir Henry Meux & Co. and Messrs. Seager, Evans and Co. of the second part, and John Thorn of the third part, whereby the premises called The Dolphin, are conveyed, for the residue of a term of years, to the *said John [*418] Thorn, in consideration of 2,200*l.*, (that is to say, 2,100*l.*

paid to the parties of the second part, and 100*l.* paid to the parties of the first part,) agreed to join therein without raising, on the face of such indenture, any question as to whether the said assignees have, as between them and the parties of the second part, a right to such 2,100*l.* or any part thereof, inasmuch as the said John Thorn objected to have the same appear on the said deed; yet, nevertheless, it is hereby declared and agreed, between the said parties of the first and second parts, that such indenture and the concurrence of the said assignees therein and in the payment over of the 2,100*l.* to the said parties of the second part, was and is expressly on the condition and understanding that the same is without prejudice to any right or claim (if any) of the said assignees, either at law or in equity, to such 2,100*l.* or any part thereof; and that the fact of the execution of such indenture by the said assignees, shall not prejudice any right whereof the said assignees were possessed before the date hereof; nor shall the signature, by the said parties of the second part, to this memorandum, prejudice any right whereof they were possessed before the date hereof; and that, in case of any proceeding hereafter, either at law or in equity or otherwise, between the said assignees and the said parties of the second part in respect thereof, the said indenture is not to be given in evidence, or used in bar or to the prejudice of any such right or claim (if any) of the said assignees: provided that this memorandum shall be delivered up to be cancelled, and the subject matter of the said indenture be considered finally settled, unless the assignees shall, on or before the 1st day of January next, proceed to enforce some claim in respect of such 2,100*l.*"

[*419] *In December, 1839, the assignees, claiming to be entitled to the 1,050*l.* paid, by Thorn to the plaintiffs, as part of Albin's estates, commenced an action, against the plaintiffs, to recover that sum, as money had and received, by the plaintiffs, to their use.

The plaintiffs, being advised that they had no defence, at law, to the action, filed the bill in this cause, in January 1840, stating the matters before mentioned, and that they had no notice, either actual or constructive, until after they had paid the 1,000*l.* and the

lease had been delivered to and depoisited with them, that Albin was or had been a bankrupt: that the cheque which was drawn, on the plaintiffs, for 1,000*l.*, part of the purchase-money for the public-house, was handed over, by Callow, as the agent and on behalf of the plaintiffs, immediately, to Gurney; and that it was made payable to him only, and not to his order or to bearer; and that the same was paid to him by allowing the amount thereof to him in account, as before mentioned; and that the cheque or the proceeds thereof never was or were in the possession or power of Albin; and moreover that the indenture of lease was delivered, by Gurney, on the execution thereof, immediately, to the clerk of the plaintiff's solicitors, as the agent and on behalf of the plaintiffs; and that the same was deposited by them at the brewery of the plaintiffs, and remained in the possession of the plaintiffs until the delivery thereof to Thorn; and that it never was in the possession or power of Albin: that the plaintiffs were entitled, under the circumstances stated, to stand in the place of Gurney as to the 1,000*l.*, the portion of the purchase money which was paid him by the plaintiffs; as being purchasers, from him, of the lien to which he would have been entitled upon the premises, in case the 1,000*l.* had *not been paid to him: that, even if they were not en- [*420] titled to stand in the place of Gurney in respect of his lien, yet they were entitled to a lien upon the public-house for the 1,000*l.* and interest, in preference to and as having a priority over the claim of the assignees; and that the assignees were not entitled to take the premises or to receive the purchase money for the same, except subject to the plaintiff's lien, or without discharging or satisfying what was due to the plaintiffs in respect of the 1,000*l.* and interest; that, according to the true construction of the memorandum of the 24th of September, 1839, the right of the plaintiffs, as against the assignees, to a lien upon the public-house for the 1,000*l.* and interest, was not to be prejudiced or affected by the execution of that memorandum or by the sale of the premises; and that the plaintiffs were at liberty, notwithstanding the sale, to assert and maintain their right to such lien, as against the assignees, in the same manner, to all

intents and purposes, as if the premises had not been sold and the lease had remained in the possession of the plaintiffs; and that, under the circumstances aforesaid, the plaintiffs were entitled to receive and retain the 1,050*l.*, so paid to them by Thorn as part of the purchase money for the public-house, by virtue of their lien and in satisfaction and discharge thereof.

The bill prayed that it might be declared that, upon the delivery of the lease of the public-house to the plaintiffs, they became and were entitled to a lien, upon the house, for the 1,000*l.* paid by them to Gurney in part of the purchase-money of the premises, together with lawful interest thereon; and that it might be declared that the plaintiffs were entitled to receive and retain the amount of the 1,000*l.* and interest, out of [*421] the *proceeds of the sale of the premises in preference and priority to the claim of the assignees to such proceeds; and that they might be decreed to retain the same accordingly; and that the assignees might be restrained from prosecuting their action.

The injunction having been obtained,

Mr. *Knight Bruce*, Mr. *G. Richards* and Mr. *Freeling*, for the plaintiffs, showed cause against dissolving it. They said that the plaintiffs were entitled to the same lien as Gurney would have had, if he had not been paid that portion of the purchase-money, which he received from the plaintiffs; that the transaction was one entire transaction; that the underlease granted by Gurney, never was in Albin's hands, but was delivered over, by Gurney, immediately after he had executed it, to the plaintiffs' agent; so that Albin did not acquire, even for a single moment, any interest in the demised premises, except subject to the plaintiffs' lien; that his assignees could not stand in a better situation than he did; but must take the property as he took it, that is, subject to the lien; for the assignees could not adopt the transaction in part, and repudiate it in part.

They cited *Dryden* v. *Frost*,(*a*) and *Ex parte Pollard*.(*b*)

(*a*) 3 Myl. & Cr. 670.

(*b*) Mont. & Chitty's B. C. 238.

1840.—Meux v. Smith.

Mr. *Jacob* and Mr. *Keene* appeared for Albin's assignees. They said that Gurney never had any lien on the premises; for he was paid the whole of his purchase-money: that the plaintiffs were no more entitled to the lien which Gurney would have had if he had not been *paid the whole of his purchase- [*422] money, than a surety in a bond who had paid the debt of his principal, was entitled to the rights of a specialty creditor as against the assets of the principal; and that, as Albin was a bankrupt at the time when the transaction took place, he was incapable of acquiring property except for the benefit of his assignees, or of creating any equity by which they would be affected.

They cited *Parry* v. *Wright.*(*a*)

THE VICE-CHANCELLOR:—The sole question in this case is, whether the lien which the brewers had, was not co-existent with the commencement of the lease at law; and it seems to me, on the circumstances stated, that that very act which did give existence to the lease at law, namely, the delivery, was the act which constituted the deposit and lien. This appears to me to be reasonably plain; but, supposing it were doubtful, still the matter must be discussed; and my opinion is, that a question of this kind is far better discussed in this Court than it can be in a court of law, because there might be a literal interpretation put on the words of the agreement of the 13th of September, 1838, which might be destructive of the case. It is quite consistent with the expression, in that agreement: "I have this day deposited the lease," that the transaction should be held to be one in which there never was any actual deposit made by Mr. Albin himself; *but that he intended that the trans- [*423] action should proceed in such a form as that, by the delivery of the lease, the deposit should commence. My opinion is, that that is the right construction, consistent with the terms of the

(*a*) 1 Sim. & Stu. 369. A bill had been filed by Seager, Evans & Co., stating the same facts, and praying the same relief as the bill in *Meux* v. *Smith.* Cause was shown, at the same time, against dissolving the injunctions in the two causes. Mr. *Swanston* and Mr. *Chandless* appeared for the plaintiffs in *Seager* v. *Smith.*

agreement, and one which would uphold the brewers' claim. Therefore, I think that the injunction should be continued.

Albin's assignees appealed, to the Lord Chancellor, from the above decision.

Mr. *Jacob*, Mr. *Wigram* and Mr. *Keene*, for the appellants, said that, in the memorandum of the 13th of September, 1838, the deposit of the underlease was expressed to have been made by Albin himself: that there was no equity in the case, distinct from the legal right; and, if there were, that there was no necessity for the Court to interfere; as the action sought to be restrained was for money had and received, which was an equitable action, that is, one in which a court of law would take into consideration and give effect to all the equities affecting the claims of the parties: that, at all events, the Vice-Chancellor ought to have ordered the money, which was the subject of the action, to be paid into court.

Mr. *Knight Bruce*, Mr. *G. Richards* and Mr. *Freeling*, appeared for the respondents.

The counsel for the appellants referred to 2 Sugd. Vend. & Purch., 409, edit. 10th, and *Toulmin* v. *Steere*.(a)

[*424] *The counsel for the respondents cited *Ex parte Pollard*; *Harrison* v. *Walker*.(b) *Taylor* v. *Plumer*;(c) *Gladstone* v. *Hadwen*;(d) *Everett* v. *Backhouse*;(e) *Hunt* v. *Mortimer*;(g) *Ashley* v. *Kell*;(h) *Winks* v. *Hassall*;(i) and *Dryden* v. *Frost*.

THE LORD CHANCELLOR:—In this case, the plaintiffs seek to have an action for money had and received restrained on the ground that they were equitable incumbrancers on the property of which the money in question was the fruits of the sale; and,

(a) 3 Mer. 210.
(b) Peake's N. P. C. 150.
(c) 3 M. & S. 562.
(d) 1 M. & S. 517.
(e) 10 Ves. 94.
(g) 10 Barn. & Cress. 44.
(h) 2 Stra. 1207.
(i) 9 Barn. & Cress. 372.

with respect to the agreement which was entered into on the sale, I think the true construction of it must be considered to be, that the thing should remain in the same state, (the rights of the parties being to be decided,) or as nearly as possible in the same state as if the sale had not taken place.

As the assignment by which the sale was effected, recites the title of the plaintiffs as equitable incumbrancers, and as the assignees are parties to it, it would, if taken by itself, be an acquiescence in the plaintiffs demand. It seems that the assignment assumed that shape at the request of the purchaser who was to take the benefit of the assignment: and, as between the parties between whom the question was depending whether the plaintiffs had an equitable claim on the property or not, it was agreed that, notwithstanding the expressions used in that assignment, the rights of both parties should remain the same as they were before, and not *be affected at all by it. This con- [*425] sequence, however, necessarily followed from the sale, namely, that, instead of an action of trover to recover the lease, which would have been the form of action in which the assignees would have asserted their title if the property had not been sold, the action brought was an action for money had and received; the money in question being a part of the purchase-money which was paid over to the plaintiffs on the sale taking place. I therefore think that I am bound to look at this case without reference to the circumstance of the property having changed its form from that of an underlease, to the purchase-money which stands in the place of that underlease; and that that transaction ought not to affect either the rights or remedies which the parties seek to have enforced in this court.

Looking, therefore, at the case as it would have stood independently of the transaction of the sale, (the parties having agreed that that should not make any difference in their rights,) I have a case of extreme hardship on the part of the plaintiffs. But that would not operate, if the case were one in which it was perfectly clear that, notwithstanding the hardship to which they are exposed, they could have no equity against the persons who, at law, probably would be considered as having the title to the lease.

Now the transaction is one which, as stated by the bill, is met by the answer as to very many material parts of it: not by any statements denying the statements in the bill; but by that which naturally was the case with regard to these assignees, I mean the statement that they were ignorant of the truth, one way or the other, of the facts stated in the bill. It is perfectly cer-
[*426] tain that, *when the plaintiffs advanced their money, they were dealing with persons who were the apparent owners of the property. Gurney was the owner of the lease; and he entered into an arrangement by which the person who turned out to be an uncertificated bankrupt, although he was not known, by the parties, to be so at the time, agreed to take the lease; but he had not the money which was required, by Mr. Gurney, for the sale of the lease. Whether Gurney and Albin came together to the plaintiffs or not, is a matter which is stated in one way in the bill, and as to which ignorance, on the other hand, is alleged in the answer. But it is quite clear, from the nature of the transaction itself, that, in order to enable Albin to pay the money to Gurney, he procured 1,000*l.*, part of it, from Messrs. Meux & Co., and another 1,000*l.* of it from Messrs. Seager & Co. What passed at the meeting which was held for completing the purchase, the Court, at present, has no means of knowing. Something may depend upon what then passed. The assignees, of course, knew nothing of what passed; they were not present, and they could know nothing except as they had been informed by other persons.

The form of the deed is not an assignment, but is an underlease, from Gurney, to the person, who, in fact, turned out to be an uncertificated bankrupt; and, on that ground the assignees claim. They say that, inasmuch as he was an uncertificated bankrupt, he could not acquire any property for himself; but was capable of acquiring property for the benefit of his assignees only. On that ground, assuming that he was, at one moment, the lessee and, therefore, the proprietor of the lease, and that the plaintiffs claim through him and through the title and
[*427] interest which he had, the assignees say that he had *no right and no power, as against them, to create any in-

terest in the property which was in himself; that he became entitled to the property by the underlease executed by Gurney, and thereby the assignees immediately became entitled to it; and that they were not bound by the subsequent dealings which took place between himself and the plaintiffs and the other parties, Messrs. Seager & Co. That is the case of the assignees.

Now the case on the part of the plaintiffs, is, of course, at the present moment, not capable of proof. Nor, of course, are the allegations in the bill to be taken as any evidence of the title which they state. But the transaction, as admitted by the answer itself, shows, from what took place before the underlease was executed by Gurney, that the real question will be probably (for that may depend on the evidence of what took place at the meeting,) not whether the plaintiffs can maintain any title derived from the uncertificated bankrupt: but whether this sort of case may not be made out, namely, that, previously to the contract being carried into effect between Gurney and the bankrupt, there was a contemporaneous contract, between the uncertificated bankrupt and Meux & Co., by which it was agreed that, although the uncertificated bankrupt was to take a lease in his own name, yet that the lease so taken in his name was, to the extent of the money advanced, to be for the benefit of Meux & Co., and Seager, Evans & Co. It may be that the evidence will displace that case; but it is possible from the nature of the transaction, and not improbable that that case may be made out. It is the most probable history of the transaction as it appears, not only from the memorandum itself, but from the facts as they are admitted in the answer, namely, *that the party who was the [*428] nominal lessee, had not himself, the money, but was obliged to borrow it from some other parties previously to his becoming entitled to the underlease from Gurney. It is, therefore, not improbable that, previously to his taking the lease, it was arranged that the money should be advanced, and the security given to those by whom the money should be advanced: at least, that is the question to be tried in the cause. What the effect of those facts is, if they turn out to be as stated on the part of the plaintiffs, will be the question to be decided in the cause.

It is not now the time for me to express my opinion as to the result of those facts, if they are established. I am only to look at the pleadings, for the purpose of seeing whether there be or be not a question to be tried between the plaintiffs and those who, at law, are the owners of the lease, namely, those who stand in the place of the bankrupt, to whom, whilst he was uncertificated, the lease was made.

I cannot say that the case is so clear, on the part of those who are asserting a title at law, and that I am so certain that the equity asserted by the plaintiffs would not be established against this property, as to justify me in refusing, to the plaintiffs, the opportunity of going into and proving and arguing their case, when the proper time shall come.

Under these circumstances, I think I am exactly in that position in which the Court constantly finds itself, where it is bound to give, to the party asserting the equity, the opportunity of proving the case and obtaining the judgment of the Court on the equity so asserted. Of course that will not apply if the Court saw no ground stated. It is not merely the asserting of [*429] an equity which *induces the Court to grant an injunction and to give relief. There must be a probable case; at least, a case which is capable of being argued; that the Court may see that there is a question to be discussed, and a question to be adjudicated on.

I have no difficulty, therefore, in saying that the case is such as makes it the duty of the Court to protect the parties who were in possession of the lease, and who, therefore, could only have been compelled to part with it, by an action at law; and the bringing of which, if it had not been commenced, this Court would certainly have restrained, for the purpose of giving the plaintiffs the opportunity of making out the equity which they have asserted. The injunction, therefore, against the action, was, I think, very properly granted by the Vice-Chancellor.

Now it has been said that this action at law will try the equity: but it has not been made out, to my satisfaction, that it would. But if it would, it is not the course of this Court, in a matter certainly originally belonging to this Court and which still belongs

to this Court, to send, or rather to permit a question of equitable lien upon the deposit of deeds under a contract in writing for that purpose, to be adjudicated on in the course of an action for money had and received. That is a subject-matter for the jurisdiction of this Court; and it is one in which, when a proper case arises for that purpose, this Court will maintain its jurisdiction, and, according to its own rules, decide on the rights between the parties.

In all those cases where the property exists in the shape of money, the Court is bound, as it interferes with [*430] the claim of the party who is asserting a legal right to it, to take care that the property shall be put in a safe place of deposit, in order to abide the ultimate decision of the Court. It is said that this money is perfectly safe. No doubt it is perfectly safe; but this Court cannot proceed on the degree of credit which particular parties may be entitled to, in the many transactions of this greaty city. I cannot take notice of it, and this Court knows nothing about it. It is, at present, money out on personal security; and, whether those persons who have got it, have a degree of credit which makes it as safe as if it were in the hands of the Accountant-general of this Court, is not a question which this Court can entertain. If I were to do that, a great variety of distinctions would have to be considered as to the degree of security which money in a particular position, in particular hands, would be likely to have. Under those circumstances, I do not feel myself at all at liberty to entertain any question as to whether the money is or is not safe where it is. I have no doubt, personally, that it is perfectly safe where it is; but I cannot exercise the jurisdiction of this Court on any such ground; and, therefore, if it is required, on the part of the assignees, that the money should be paid into court, it is a matter quite of course that the money to which they are *prima facie* entitled and the legal title to which I prevent them from asserting by continuing the injunction, should be secured in court, for the purpose of abiding the ultimate result of the question between the parties.

I think the injunction, therefore, must be continued.

[*431] 1843.—*January* 16*th and* 17*th*.—*The cause now came on to be heard.(*a*)

Mr. *Bethell* and Mr. *Freeling* appeared for the plaintiffs. They cited *Ex parte Browne*;(*b*) *Ex parte Lees*;(*c*) *Butler* v. *Hobson*.(*d*)

Mr. *Jamee Russell*, Mr. *Anderdon* and Mr. *Shebbeare*, appeared for the defendants. They cited *Ex parte Coombe*;(*e*) *Hesse* v. *Stephenson*;(*g*) *Swan* v. *The Bank of Scotland*;(*h*) *Ex parte Rucker*.(*i*)

THE VICE-CHANCELLOR:—I do not require any reply; because the case appears to me to remain pretty much the same as it did when it was brought before me for the purpose of the injunction.

I do not understand that, with respect to that which constituted the ground of equity, the Lord Chancellor entertained a different opinion from me. The only difference of opinion was this,—that I, perhaps, thought the case so clear that it was not necessary to have the money brought into court; but the Lord Chancellor thought it might be open to doubt; and, therefore, did order the money to be brought into Court. I believe that was the sole difference between us.

[*432] *Looking at the transaction as it appears on the whole of the evidence, I see no reason to alter the opinion which I expressed on the principal question in the cause, when I ordered the injunction to be continued. I am perfectly willing to admit that, where a matter proceeds on the footing of a memorandum, and that is the transaction between the parties, the Court will not allow the memorandum to be departed from. But here I am obliged to take the antecedent and the subsequent

(*a*) The cause of *Seager* v. *Smith* was heard at the same time. Mr. *Swanston* and Mr. *Chandless* appeared for the plaintiffs; and Mr. *James Russell*, Mr. *Anderdon*, and Mr. *Shebbeare*, for the defendants.

(*b*) 15 Ves. 472.

(*c*) 16 Ves. 472.

(*d*) 5 Bing. N. C. 128.

(*e*) 17 Ves. 369.

(*g*) 3 Bos. & Pull. 565.

(*h*) 1 Deacon, 746.

(*i*) 1 Mont. & Ayr, 481.

facts, which have been given in evidence, together; and it appears to me to be distinctly made out that the application was, first of all, made by Albin to Messrs. Meux, at one time, and to Messrs. Seager at the other, to advance him the sum of 1,000*l.* each, for the purpose of enabling him to take the house from Mr. Gurney. Then the parties met on the 13th of September, and, there having been the previous promise given by Messrs. Meux for themselves, and by Messrs. Seager for themselves, that they would advance the sum of 1,000*l.* each, Messrs. Meux, by their agent, delivered, to Gurney, a cheque on themselves for one of the sums of 1,000*l.*, and Messrs. Seager delivered to him a cheque on themselves for the other sum of 1,000*l.*; and Gurney being indebted to each of those firms, Messrs. Meux wrote off the amount of the check given by them, from the debt due to their firm, and Messrs. Seager, wrote off the amount of the check given by them, from the debt due to their firm. This mode of dealing was the same, in effect, as if Messrs. Meux and Messrs. Seager had advanced 1,000*l.* each to Albin; and so the parties understood it. Then Gurney executed the underlease; and, whether he first sealed it and then delivered it to the clerk of Messrs. Meux's solicitors, or said: "I seal and deliver this as my act and deed," and then delivered it to the clerk, appears to me to be unimportant; because *it was all one [*433] transaction; and it appears to me that the creation of the legal estate was simultaneous with the creation of the equitable lien of the brewers and the distillers.

Now it is observable that Messrs. Meux and Messrs. Seager had actually entered into the contract that they would pay those two sums of 1,000*l.* each; and I should like to know whether they did not do so for a consideration. Because, on the footing of their undertaking to pay the two sums of 1,000*l.* and 1,000*l.* to Mr. Gurney, for Mr. Albin, Mr. Gurney did actually execute the lease, and caused to depart from himself the legal estate, *pro tanto*, of that thing which he held by virtue of the original lease. In point of fact, the whole was conducted *bona fide*; and, on the two checks being presented to the different parties, they acted on

their promise at once, and discharged Gurney's account to the amount of those checks.

I do not think that the mere terms of the memorandum, which was only given as part of the transaction, ought to have the effect of defeating the whole of the case; but they are to be taken, rather, in aid of the case; and though the matter may be partially misrepresented, the substance of the memorandum tallies with the rest of the evidence; and my opinion, therefore, is that Messrs. Meux and Messrs. Seager, have, in their different suits, established their right to have the equitable lien which was created by means of the deposit.

[*434] *GORST *v.* LOWNDES.

1841: 15th January.

A testator directed the income of his property to be accumulated for the term of 21 years from his death. The testator died on the 5th January, 1820. Held that, in the computation of the term, the day of his death was to be excluded; and, consequently, that the dividends on stock which became due on the 5th January, 1841, were subject to the trust for accumulation.

THE testator in the cause devised his real and personal estate to trustees, in trust to receive the income arising from the whole of his real and personal estate, for the term of 21 years from his death, and, during the continuance of the aforesaid term, to accumulate such income, and, from time to time, and at such times as the trustees should think fit, to invest the personal estate and the income of his real and personal estate, and all accumulations thereof in the purchase of real estates, and to take conveyances thereof in their own names, and to accumulate and apply the income of the purchased estates in like manner; and, at the expiration of the term of 21 years, upon trust to convey all the real estates then vested in them by the will, or by any of the means aforesaid, to certain uses in strict settlement.

The testator died at about half-past two o'clock in the afternoon of the 5th of January, 1820.

1840.—Gorst v. Lowndes.

On the 6th of January, 1841, the first tenant for life under the will, presented a petition stating that the clear residue of the testator's personal estate, and the income of his real estates, and the accumulations thereof, up to the 4th of January, 1841, consisted of 184,984*l.* consols, and of certain other sums of stock: that the petitioner was advised, and submitted that the term of 21 years from the death of the testator, expired on the 4th of January, 1841: that one half-year's dividend on the 184,984*l.* consols accrued due on the 5th of January, 1841, which was after the expiration of the *term; and that the petitioner was [*435] entitled to that dividend as such first tenant for life.

Mr. *Jacob* and Mr. *Ellison*, for the petitioner, said that the period of accumulation was to be computed in the same way as the period of minority; and that, if a child was born on the 5th of January, 1820, it would be of age on the 4th of January, 1841: that though, by the Act of Parliament by which the stock in question was created (25th Geo. 2, c. 27,) the dividends were payable on the 5th day of January, and the 5th day of July in every year, yet the dividends were not demandable until the following day. They cited *Toder* v. *Sansam*,(a) *Lester* v. *Garland*,(b) *In re Farquhar*,(c) *Godson* v. *Sanctuary*,(d) *In re Whitby*,(e) *Pellew* v. *The Inhabitants of Wonford*,(g) *Hardy* v. *Ryle*,(h) *Blunt* v. *Heslop*.(i)

Mr. *Wigram* and Mr. *Lowndes*, *contra*, cited *Ackland* v. *Lutley*,(k) and *Pugh* v. *The Duke of Leeds*.(l)

Mr. *G. Richards* and Mr. *E. F. Smith* appeared for the trustees.

Mr. *Knight Bruce* and Mr. *Bridger* appeared for other par-

(a) 1 Bro. P. C. 468.
(b) 15 Ves. 248.
(c) Mont. & Macarth. 7.
(d) 4 Barn. & Adol. 255.
(e) Mont. & Chitty, 671.
(g) 9 Barn. & Cres. 134.
(h) Ibid. 603.
(i) 8 Adol. & Ell. 577.
(k) 9 Adol. & Ell. 879.
(l) Cowp. 714.

ties; but were instructed not to take any part in the argument.

THE VICE-CHANCELLOR:—I should have thought this the simplest question in the world.

[*436] *I have generally understood the rule to be that, ordinarily speaking, where a party creates a term from a certain day, that day is excluded in the computation of the term.

Here the testator has directed the trustees of his will to receive and accumulate the income of his real and personal estate for the term of 21 years from his death; and I should have thought it to be perfectly clear that, where a person gives such instructions, the term would have extended to the 21st anniversary of the day mentioned; and that the whole of that anniversary, would be a portion of the term, or, in other words, that the day of his death would be considered as a point, and the last 5th of January would be included in the term of 21 years.

The Act of Parliament which has been referred to, says that the dividends on consols shall be issued and paid, half yearly, on the 5th day of January, and 5th day of July. That dividend, therefore, which accrued due in the course of the 5th of January before the term ended, was a sum to which the trustees were entitled.

I do not think that there is any weight in the objection that the accumulations were to be laid out in land, and, therefore, ought to be considered as land. For, although it is true that, if that had been done, there would have been certain days appointed for payment of the rent, yet no one can tell what those days would have been. As the funds stand, the accumulation was to go on till the end of the 5th of January, 1841, and, by the Act of Parliament, the dividend became payable on

[*437] that day, and therefore must be considered *to have been then paid; and the rights of the parties were then determined.

Declare that the dividends which became due on the 5th of January, 1841, were part of the accumulated fund.

AKED *v.* AKED.

1843: 19th and 31st January.

The clerk of records and writs is not compellable to file the answer of a defendant who has refused to take an office-copy of the bill.

THE Clerk of Records and Writs, in whose division this cause was, having declined to file the answer of the defendants, because they had refused to take an office-copy of the bill, a motion was made, on behalf of the defendants, that the clerk might be directed to file the answer notwithstanding such refusal.

Mr. *Bethell* and Mr. *Rogers*, in support of the motion, contended that the Six Clerks, or the Clerks in Court, before their offices were abolished by 5th & 6th Vict., c. 103, had no right to impose on a party to a suit, the necessity of taking an office-copy of a pleading in the suit, nor had the Clerks of Records and Writs (to whom the duties of the Six Clerks and Clerks in Court, as officers of the Court, had been transferred,) any such right. They referred to sections 1, 2, 3, 21, 22, and 31 of the Act above mentioned; and to the 3d, 8th, and 32d of Lord Lyndhurst's Orders of the 26th of October, 1842, and the second schedule thereto. They added that the 14th rule of 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, which provided that, where a defendant was in contempt in not answering, and should be able to put in his answer by borrowing or obtaining a copy of

*the bill, without taking an office-copy of it, he should [*438] not be compellable to take any such copy, was not a recognition of the right in question, but was merely a bye-allusion to a practice existing in the Six Clerks' Office.

The motion was not opposed.

31*st January*.—THE VICE-CHANCELLOR:—I believe that no one acquainted with the practice of the Court, doubts that, before the month of October last, it was the settled practice of the

Court that an office-copy of the plaintiff's bill, should be taken by the defendant, before he could be allowed to file his answer.

The order of the 28th of November, 1743, in Mr. Beame's Orders, p. 369, under the head of "Sworn Clerks and Waiting Clerks," p. 395, has this regulation: "Where any person entitled to privilege of parliament pursuant to the Act of Parliament of the 12 & 13th of King William the 3d, has been served with an office-copy of the bill, such person shall not be obliged to take out or pay for any other copy of such bill upon his appearance thereto:" which regulation plainly shows that, but for that regulation, the defendant would have been obliged to take an office-copy of the bill upon entering his appearance.

In the Cursus Cancellariæ, 2d edition, published in 1727, p. 99, there is this passage: "After the defendant has appeared, he must first take out an office-copy of the plaintiff's bill before he can answer it; which copy costs him about 12*d.* per [*439] sheet in the Six Clerks' *Office; and, with this copy, he ought to apply to counsel, who will advise him either to answer or to plead or demur to the plaintiff's bill." This passage directly shows what practice was one hundred and sixteen years ago: and, though it does not appear to have been founded upon any express order of Court, yet, from its long continuance, it was as binding as if it had been founded upon a positive order.

The 14th rule of the 15th section of 1 Wil. 4, c. 36, clearly recognizes the practice to be binding; and, upon the spirit, though not the letter of that rule, I acted on the 27th of July, 1836, in the case of *King* v. *Bryant*, when the defendant was brought up, by *habeas*, for not putting in a further answer. He said he had put it in. But it was stated that the clerk in Court refused to file it, because the defendant refused to pay for an office-copy of the exceptions. I ordered that the defendant should either make an affidavit that he was unable to pay for the office-copy, or that he should pay for it. The defendant paid for the office-copy, and the answer was filed. It is to be observed that the defendant was not only a solicitor, but one by no means willing to do more than he was obliged to do.

But it has been said that the Act 5 & 6 Vict. c. 103, which has abolished the office of Six Clerks, has abolished all the customs and incidents relating to it. The Act has abolished the office; but has not abolished the business transacted by means of it, or altered the mode of doing it. On the contrary, by the third section, it is enacted that the business of the Clerks of Records and Writs shall be, besides what is specified in the Act, such as the Lord Chancellor shall, in a given manner, direct: and, by the third order of the 26th of October last, his Lordship has directed in these words: "That the [*440] Clerks of Records and Writs shall perform all such duties as have heretofore been performed by the Six Clerks, Sworn Clerks or Waiting Clerks, as officers of the Court, in relation to the several matters hereinafter mentioned; that is to say:—

The filing, custody, copying and amending of all informations, bills, demurrers, pleas, answers, and other pleadings and records:

The entering of appearances, rules, consents, notes and memorandums of service:

The certifying of appearances and proceedings:

The custody of exhibits deposited for inspecting and copying:

The attendance with records and exhibits on the Judges of the Courts, on the Masters in Ordinary, and at assizes or elsewhere:

The enrollment of decrees and orders; and all other duties heretofore performed by the Six Clerks, Sworn Clerks or Waiting Clerks, as officers of the Court, in relation to suits and matters in equity, and not as attorneys, solicitors or agents of the parties in suits or matters in equity.

How are these duties to be performed otherwise than in the way in which they were formerly performed? Can it be supposed that this order, which directs the duties to be performed, has varied the manner of performing them? For instance, must not the Clerk of Records and Writs determine whether a bill or answer [*441] is in a proper form to be filed, by the same rule as a Six Clerk would have done? If the schedule of fees had omitted the fees upon office-copies of bills,

there would have been some ground for the application. But the schedule has not omitted them. The Act of Parliament, in the 22d section, has declared that it is expedient that the suitors' fund shall, at all times, be kept up; and, by the 21st section, has directed that all fees should be paid into it; and it has, by the 30th and 33d sections, charged it with new expenses; but it has not said one word as to the abolition of fees formerly taken by the practice of the Court. If the Legislature had intended that those fees should have been abolished, without doubt the Act would have contained a provision to that effect. If the Lord Chancellor had intended so, the orders would have expressed that intention. But, in that respect, the Act and orders are silent.

It is said that the magnitude of the fees demandable under the practice, makes this a case of great importance. Without doubt it does. But the noble and learned Lords who concurred in framing and passing the Act, must have been as well aware of that, as the solicitors of the Court, and yet were content to say nothing about abolition.

When the orders were sent to me for perusal before they were signed, I never thought, for a moment, that they were intended to have such an effect as is imputed to them; and I know, from very high authority, that it was not intended that the fees authorized to be taken, by the custom of the Court, upon the filing of an answer, should be abolished.

Upon the whole, my opinion is, that there is no ground for the application, and no order can be made upon it.

*Stuart *v.* Lord Bute. [*442]

1841 : 13th January.

A defendant who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm, of which he was a member, stated, in his answer, that he and his co-partners had given express directions to their agent, in whose custody the books were, not to produce them to any one, or allow any stranger to inspect them, without the express authority of the defendant and his co-partners: that the books were not in the power of the defendant alone, but of the defendant and his co-partners, and that the defendant had no right or lawful power to produce them or set forth their contents, without the consent of his co-partners. Held, that the answer was insufficient, as the defendant did not state that his co-partners had refused to consent to his setting forth the entries.

The Master having certified that the examination put in, by the defendant, Lord Wharncliffe, to interrogatories exhibited under the decree, was insufficient, his Lordship excepted to the certificate.

The first interrogatory was as follows: "Whether or no are you now engaged in partnership with Lord Ravensworth and John Bowes, Esq., or any and what person or persons, for the purpose of working and carrying on the collieries in the pleadings of this cause mentioned, or any of them, and how long have you been in such partnership?"

In answer to that interrogatory, the defendant said that he was then engaged in partnership with the parties, and for the purpose mentioned, and that he had been in such partnership from the year 1809, *or thereabouts*, to the best of his recollection, information and belief, to the then present time.

The Vice-Chancellor said that there were no limits which, of necessity, must be given to the words, "or thereabouts," and consequently that the answer to the first interrogatory was insufficient.

The second interrogatory was as follows:

*"Whether or no are the accounts and books of ac- [*443]
count of the said partnership, which commenced in the

said year 1726, from the commencement or since any and what period of time, or any and which of such accounts or books of account, kept at the office situate at Newcastle-upon-Tyne, in which the affairs of the said partnership are carried on, or in any and what other place, and whether or not in the custody of Nicholas Wood or any other and what person or persons, and whether or not as agent or agents for the said partnership of which you are now a member, or how otherwise; and, in particular, are not the accounts and books of account of the said partnership which commenced in the year 1726, for and during the said years 1792, 1793, and 1794, or some and which of such accounts or books of account, now, or have not such accounts and books of account, or some and which of them, been, at some time and when last, at the said office, or at some and what other place, and whether or not in the custody of the said Nicholas Wood or some other and what person or persons, as, you know or, for some and what reason, believe, else what has become of such last-mentioned accounts and books of account, to the best of your knowledge, information and belief."

The answer to that interrogatory was as follows: "To the second of the said interrogatories this examinant saith that *he believes* the accounts and books of account of the said partnership which commenced in the said year 1726, from the commencement thereof, are kept at the said office, and in the custody of the said Nicholas Wood as agent for the said partnership of which this examinant is now a member; and this defendant is informed and *he believes* that the accounts and books of account of the said partnership which commenced in the year

[*444] *1726, for and during the years 1792, 1793 and 1794, are now at the said office and in the custody of the said Nicholas Wood, but as the agent for the said partnership, and not otherwise; and the said Nicholas Wood has no right or power to remove the same or any of them, or to produce them to any stranger, or to deal therewith, in any manner, without the express consent or authority of this examinant and his said co-partners."

1841.—Stuart v. Bute.

Mr. *Knight Bruce* and Mr. *Jacob*, for the plaintiffs, contended that, as the interrogatory related to a fact which was within Lord Wharncliffe's own knowledge, his Lordship was bound to answer it positively, and that it was not allowable for him to answer it according to his belief merely.

THE VICE-CHANCELLOR:—I think that this answer is sufficient. Because the question is addressed to a fact of which it is almost impossible that Lord Wharncliffe can have personal knowledge to the full extent to which it goes.

The question is whether the books to the partnership which commenced in the year 1726, are in the posession of Mr. Wood. Now Lord Wharncliffe may have very good reason for believing that the books of the partnership are in Mr. Woods possession: but how it is possible that his Lordship should *know* the fact, I declare I am unable to conceive; because how can he know that their might not have been some other book besides the many waggon-loads of books that, happen now to be at the office? It appears to me to be a fact which is, of itself, beyond the power of human possibility to say he knows, having regard to the subject matter of the interrogatory.

*I think the answer is sufficient on the face of it, and [*445] quite sufficient to enable the parties to act upon it, particularly as I observe that the defendant finishes the answer thus: "and the said Nicholas Wood, has no right or power to remove the same or any of them, or to produce them to any stranger, or to deal therewith, in any manner, without the express consent or authority of this examinant and his said co-partners."

In answer to the third interrogatory, the defendant said that Nicholas Wood had, during the last two years, namely, at the annual meeting held, by the defendant and his co-partners, in May, 1838, applied to the defendant and his co-partners, when they were all present, for directions respecting the accounts and books of account of the partnership which commenced in the year 1726, and, in particular, such of the accounts and books of account as related to the years 1792, 1793, and 1794; and that the

defendant and his co-partners had, concurrently, given directions to Wood not to produce the accounts or books of account to any person whatever, or allow any stranger to inspect them without the express direction, or authority of the defendant and his co-partners, and, in particular, that the defendant, at the meeting in May 1838, concurred with his co-partners in giving such directions; and that such directions were given in consequence of an application made, to Lord Ravensworth, by or on the part of the plaintiff, Lord Stuart de Rothsay.

The counsel for the plaintiffs admitted that answer to be sufficient.(*a*)

[*246] *The fourth interrogatory required the defendant to set forth, according to the best of his knowledge, information and belief, a full, true and particular list or schedule and description of all and every the ledgers, day-books, bankers' books, bill books, and other accounts and books of account, of and relating to the partnership which commenced in the year 1726, and their dealings and transactions during the year 1792, 1793 and 1794, which then were, or, at any time, had been in his possession, custody or power, or in the possession, custody or power of his solicitors or agents, solicitor or agent, or of the partnership of which he was then a member, or of Nicholas Wood, or any other person or persons as agent or agents for the last-mentioned partnership, and which contained any entry or entries relating to the several particulars thereinafter mentioned, (that is to say,) the quantities of coals resting at the pit's mouth and the staiths belonging to or used by the partnership which commenced in the year 1726, at the death of the testator John Earl of Bute, and the subsequent sale of such coals, and the clear amount of money produced by the sale thereof, and when and by whom such moneys were received, and how the same were applied, and also the sums due, to the last-mentioned partnership, at the death of the testator, John Earl of Bute, from the several persons then employed by them as fitters, and from the Tyne Bank at New-

(*a*) The answer to the third interrogatory was inserted in the text, because it is referred to in the judgment.

castle, and from Richard or Robert Clark, the cashier of the collieries, and from the several other persons then indebted to the last-mentioned partnership; and when and by whom the several sums so due from the fitters, from the Tyne Bank and the cashiers and the several other persons, were received, and how the same respectively were applied; and whether the late Countess of Bute, as devisee for life of the testator's share of the *collieries, or the lat, William Stuart, Lord Archbishop of Armagh, as her executor, in respect of such her life estate, received or derived any benefit or profit from the use of the said coals and moneys, in the working and carrying on the collieries from the time of the death of John Earl of Bute, or relating to any or either of these particulars, or which contained any entries or entry showing or tending to show the quantity of coals sold, by each of the fitters indebted to the partnership at the death of the testator, in each month of the years 1792, 1793 and 1794, subsequent to his death, or the price at which such coals were sold, or the bills drawn upon or sums paid, by such fitters, to the partnership, during each of those months, or the state of the account of each of the fitters with the partnership in each of those months, or the dividends paid to the late Countess of Bute or to her executors, or any person or persons on her or their account, in respect of the profits made by the partnership; and where and in whose possession or custody the ledgers, day books, bankers' books, bill books, accounts and account books, and every of them, then were, and what had become of such of them as had been, but were not then, in such possession, custody or power. [*447]

The 5th interrogatory required the defendant to set forth a full, true and particular schedule or copy of all and every the entries or entry contained in any of the ledgers, day books, banker's books, bill books and other accounts and books of account by the last interrogatory mentioned or inquired after, which, in any way, related to the several particulars and matters in the last interrogatory, more particularly mentioned, or any of them, or by which the truth respecting the same might, in any degree be ascertained; and to state, with reference to each

[*448] *of the entries, in what book or account, and in what page the same was to be found.

The 6th interrogatory was as follows: "Say whether you have, before putting in your answer and examination to these interrogatories, made yourself or caused to be made by others and whom, any and what search into, or examination of the several accounts and books of account, of or relating to the said partnership which commenced in the year 1726, now in your possession, custody or power, or in that of your solicitors or agents, solicitor or agent, or of the said partnership of which you are now a member, or of the said N. Wood, or any other person or persons as agent or agents of the said last-mentioned partnership, or what steps have you taken to enable yourself to give the information asked for by these interrogatories."

The defendant, in answer to the 4th interrogatory, said that he had, in the schedule thereto annexed, set forth, to the best of his knowledge, information and belief, a full and true and particular list or schedule and description of all and every the books of account of or relating to the partnership which commenced in the year 1726, and their dealings and transactions during the years 1792, 1793, and 1794, which then were in the office at Newcastle belonging to the defendant and his co-partners, and which books were not in the possession or power of the defendant, but of him and his two co-partners jointly, and that he had no right or power to remove or part with, or produce the same or any or either of them without the consent or authority of his co-partners; and, save as appeared thereby, and by the schedule thereto, the defendant denied that any ledger, day-book,

[*449] banker's book, bill book, or other account or *book of account, of or relating to the co-partnership and their dealings and transactions during the years 1792, 1793, and 1794, was then or ever was, in his possession, custody or power, or in the possession, custody, or power of his solicitors or agents, solicitor or agent, or of the partnership of which the defendant was then a member, or of Nicholas Wood, or any other person or persons as agent or agents for the last-mentioned partnership, or which contained any entry or entries relating to the several particulars

in the 4th interrogatory mentioned or referred to, or relating to any of such particulars, or which contained any entries or entry showing or tending to show the quantity of coals sold by each of the fitters indebted to the partnership at the death of the testator in each month of the years 1792, 1793, and 1794 subsequent to his death, or the price at which such coals were sold, or the bills drawn upon or sums paid by such fitters to the partnership, during each of those months, or the state of the accounts of each of the said fitters with the said partnership in each of those months, or the dividends paid to the late Countess of Bute, or to her executors or any person or persons on her or their account, in respect of the profits made by the partnership.

In answer to the 5th interrogatory, the defendant said that the books comprised in the schedule thereto, were very voluminous and the accounts therein of great length, and that he had never read or examined any or either of such books or any or either of the accounts or entries contained therein respectively or in any or either of them, and that he was wholly ignorant of such books and accounts and entries, and that he knew not and was unable to set forth, as to his belief or otherwise, a full, true and particular schedule, or copy, or description of all and every the entries or entry (if any) contained in *such [*450] books or any or either of them, which in any way related to the several particulars and matters in the last preceding interrogatory more particularly mentioned, or any or either of them, or by which the truth respecting the same might, in any degree be ascertained, or to state with reference to each of the said entiries (if any) in what book or account, or in what page the same (if any) was to be found: and that he had no right or lawful power to set forth the contents of the books mentioned in the schedule thereto, or any or either of them, or any part of such contents, as required by that interrogatory, without the consent or authority of his co-partners, even if he knew or had the means of setting forth such contents.

In answer to the 6th interrogatory, the defendant said that he had, before putting in his examination, made or caused to be made, by his solicitors, an inquiry as to the number and nature

and extent of the books and accounts comprised in the schedule thereto, and he had been informed, and he believed that the same were very voluminous and extensive; but that, save as aforesaid, he had not, before putting in his examination, made himself or caused to be made, by any other person, any search into or examination of the several accounts and books of account, mentioned in the schedule thereto, of or relating to the partnership which commenced in the year 1726, then in the possession or power of this defendant and his co-partners as aforesaid, or taken any steps to enable himself to give the information asked for by the interrogatories.

Mr. *Stuart* and Mr. *Parry*, for the defendant, Lord Wharncliffe, said that the right to enforce the setting forth of the con-
[*451] tents of a document, was identical with *the right to enforce the production of the document itself; that one of several partners could not be compelled to produce the books of the partnership, in opposition to the wishes of his co-partners, and in a suit to which they were not parties; and, consequently, he could not be compelled to set forth their contents: that the contents of the books were as much the property of the co-partners as the books were; and it would be absurd to hold that a partner was not bound to produce the books, but was bound to make a copy of their contents and give it to his adversary, without the consent of his co-partners: that, as a party who had in his possession a document containing a confidential communication, could not be compelled to produce it, so neither could he be compelled to set forth its contents. *Murray* v. *Walter*,(a) *Taylor* v. *Rundell*,(b) *Unsworth* v. *Woodcock*,(c) *Latimer* v. *Neate*,(d) *Atkyns* v. *Wright*,(e) *Somerville* v. *Mackay*.(g)

THE VICE-CHANCELLOR:—I do not see how the inability to give this statement of the entries, is made out.

(a) 1 Craig & Phill. 114.
(b) Ante, p. 391; and 1 Craig & Phill. 104.
(c) 3 Madd. 432.
(d) 4 Clark & Fin. 570.
(e) 14 Ves. 211.
(g) 16 Ves. 382.

In a case where a party says, in his answer, that the book in question is not in his possession, but is in the possession, of himself and of A. and B., and that they refuse to let him have it; he states a physical impossibility to give the information required. But what is the difficulty in this case? For I confess that I cannot make it out.

*Why am I to presume that this partnership is unlike [*452] any other partnership, and is so constituted as that one partner may not take a copy of the entries in a book belonging to the partnership?

As I understand what is stated in the answer to the third interrogatory, it is this, namely, that Lord Wharncliffe and his co-partners have concurrently given orders, to Wood, their agent, not to allow access to the books and accounts of the partnership.

Now, so far as the circumstance of making a copy, can be identified with the circumstance of production, the two things would be subject to the same rule. And if you state a case in which it appears to be physically impossible for the defendant alone to make a production, then the Court says that it can make no order on him for production. So where a copy is required to be made, if it appear that the defendant is so circumstanced as that he cannot make it, of course the Court would not order him to do that which is impossible. But is it represented, on this examination, that it is impossible? It does not appear to me that there is anything like it. What is stated in the answer to the third interrogatory, is this: "And that this examinant and his co-partners have concurrently given directions, to Nicholas Wood, not to produce the accounts or books of account, or any of them, to any person whatever, or allow any stranger to inspect them without the express direction and authority of this examinant and his co-partners." But can the defendant, by joining with the other two partners, make the matter rest on the concurrence of the three, unless he can show that he had a right, himself, as against the plaintiff, to give that authority to Nicholas Wood? There is no pretence for that.

[*453] *Then, what is said in answer to the 5th interrogatory, is a very different thing. The defendant first states that the books comprised in the schedule, are very voluminous: which is a statement that has no reference to the contents: for it does not follow that, because the books are voluminous, the entries are voluminous; and, therefore, the statement that the books are voluminous, is merely surplusage, and merely put in to mislead. Then he states "that he has no right or lawful power to set forth the contents of the books mentioned in the schedule thereto, or any or either of them, or any part of such contents as required by the interrogatory, without the consent or authority of his co-partners." Now suppose that to be true; still he does not state that his co-partners have refused to give their consent: and, therefore, as it stands on his own answer to that interrogatory, it does not appear that he is unable to set forth the contents.

Unless a physical inability is made out on the answer, my opinion is that the Court must hold that he is bound to set forth the contents.

[*454] *DOBEDE *v.* EDWARDS.

1841: 16th January.

An order was made that a cause should stand over, with liberty to the plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs. The plaintiff made default, and the defendant obtained an order to dismiss, without notice. Held, that the order was regularly obtained.

WHEN this cause came on to be heard, it was found to be defective for want of parties: whereupon it was ordered that the cause should stand over, with liberty to the plaintiff either to amend or to file a supplemental bill, within a month, for the purpose of bringing the absent parties before the Court; and, on his making default therein, that the bill should be dismissed with costs. The plaintiff having made default,

1843.—Blathwayt v. Taylor.

Mr. *Tennant* obtained an order, without notice, for dismissing the bill with costs. The registrar, however, being of opinion that notice of the application ought to have been given, declined to draw up the order.

THE VICE-CHANCELLOR was inclined at first to agree with the registrar; but, afterwards, directed the order to be drawn up: saying that the 17th General Order of November, 1831, after pointing out the proceedings to be taken by a plaintiff after replication, directed that, if he should make default therein, then, upon application by the defendant upon notice of motion, the Plaintiff's bill should stand dismissed out of Court, with costs, unless the Court shall make special order to the contrary; so that the words "notice of motion," were inserted where the Court thought that notice ought to be given; and, therefore, it was to be inferred that where, as in the present instance, those words were not introduced, notice of the application for the order need not be given.

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*BLATHWAYT *v.* TAYLOR. [*455]

1843: 19th January.

If the executors and trustees of a will, file a bill for the purpose of having the rights of the defendants in the residue, ascertained, without either praying that the accounts of the personal estates may be taken, or offering to account for it, but admitting that there is a residue; the Court will declare the rights of the defendants in the residue, without directing the accounts of the personal estate to be taken, although the defendants apply, at the hearing, to have the accounts taken.

THE bill was filed, by the trustees of a will, against the pecuniary and residuary legatees, praying that the rights of the defendants in a legacy of £9,000, and in the residue, might be ascertained and declared, the plaintiffs being ready to act as the Court should direct.

The bill admitted that there was a residue; but did not pray

or contain any offer, on the part of the plaintiffs, to have the the accounts of the personal estate taken.

Mr. *Anderdon* and Mr. *Craig*, for one of the defendants, a tenant for life of a share of the residue, submitted that the accounts of the personal estate ought to be taken, in order to ascertain the amount of the residue.

The plaintiffs, by their counsel, objected to the accounts being taken.

THE VICE-CHANCELLOR held that, as the bill admitted that there was a residue, the Court would decide what the rights of the parties were with respect to it, without ascertaining its amount; and that the defendants were not entitled to have the accounts of the personal estate taken in this suit, but must file a bill for that purpose.

Mr. *Bethell* and *Blunt*, for the plaintiffs.

Mr. *Wakefield*, Mr. *Burge*, Mr. *Koe*, Mr. *Teed*, Mr. *Hull*, Mr. *Glasse* and Mr. *W. R. Ellis*, for defendants.

*Hodson *v.* Ball. [*456]

1841 : 2d and 24th December.

A legatees' bill did not seek to charge the executors for wilful default, and the decree was made accordingly. Afterwards the plaintiff filed another bill against the same defendants, alleging that, during the prosecution of the decree, he had discovered that the executors, in various instances (which he stated) had been guilty of wilful default, and praying that they might be charged accordingly. Held, that the latter was a supplemental bill in the nature of a bill of review; and, as it had been filed without leave, the Court ordered it to be taken off the file, notwithstanding it was regular so far as it stated the death of one of the defendants to the original bill, and prayed that the suit might be revived against his personal representative: held also, that it was not necessary for the defendant, on whose behalf the motion was made, to serve his co-defendants with notice of the motion.[1]

In 1835, one of the sons of John Hodson, deceased, filed a bill against Robert Richardson and John Ball, the two surviving executors and trustees of John Hodson's will, and also against the representative of Elizabeth Hodson, deceased, who was the testator's widow and the other executor and trustee of his will and had principally acted in the execution and performance of the trusts, praying, (amongst other things) that the trusts of the will might be carried into execution; that the usual accounts might be taken of the testator's personal estate, and of the rents, profits and proceeds of the sale of his real estates, come to the hands of the executors and trustees: but the bill did not charge them with having been guilty of wilful neglect or default, or pray any relief against them on that ground; and, consequently, the decree in the cause, which was pronounced in June, 1839, was in the form usual in suits of the like nature.

Whilst the decree was being prosecuted in the Master's office, Richardson died intestate, and his sister, Elizabeth Richardson, took out administration to his estate.

*In July, 1841, the plaintiff filed a bill against [*457] Elizabeth Richardson and the surviving defendants to

[1] This case was affirmed on appeal to the Lord Chancellor. (1 Phil. 117. See also note 2, page 183, and note 3 to page 184 to same case.)

the original suit, which, after stating the proceedings in that suit, alleged, by way of supplement, that, in the course of the proceedings in the Master's office under the decree, the plaintiff, for the first time, discovered that Robert Richardson and Ball, as well during the life of the testator's widow as after her decease, had repeatedly interfered and acted in the trusts of the will and in the management of the trust estate, and were privy to all the widow's dealings and transactions in relation thereto: that she, with their privity and consent, had wasted and misapplied the testator's estate; and that they had been guilty of culpable laches or default, and had, thereby, enabled, and, in fact, allowed the widow to waste and misapply the estate to a large amount, and, thereby, had rendered themselves personally liable to answer and account for all the moneys received by her in respect of the estate. The bill prayed that the original suit and the decree might be revived against Elizabeth Richardson, and that the plaintiff might have the benefit thereof against all the defendants; and that it might be declared that, in taking the accounts of the testator's estate, his widow or her estate ought to be charged with all such sums of money belonging to the estate, as, but for her wilful neglect or default, might have been received by her, as well as for all such sums of money as were in fact received by her; and that her estate ought also to be charged with interest upon the amount of all sums of money which had been wasted, lost or improperly retained by her; and, in case the defendant, S. Hodson, her personal representative, should not admit assets to answer the purposes aforesaid, then that the usual accounts might be taken of her estate; and, in [*458] case it should appear that her *assets were insufficient to answer what should be found due from her estate, then that it might be declared and decreed that, under the circumstances therein stated, the defendant Ball and the estate of Robert Richardson ought to make good such deficiency; and that it might be also declared that, in taking the accounts of the testator's estate, the defendant Ball and the estate of Robert Richardson ought to be charged with all such sums of money as, but for their wilful default or neglect, might have been received

by them or have come to their hands in respect of the testator's estate, either in the lifetime of his widow or after her decease, and also with interest upon all such sums of money belonging to the estate as they had wasted or misapplied.

The last-mentioned bill having been filed without the leave of the Court, a motion was now made, on behalf of the defendant Ball, that it might be taken off the file for irregularity.

Mr. *G. Richards* and Mr. *Phillips*, in support of the motion, said that the bill in question sought to vary the decree of June, 1839, and, therefore, it was a supplemental bill in the nature of a bill of review, and the plaintiff had acted irregularly in filing it without having previously obtained the leave of the Court: *Anon*,(a) *Wortley* v. *Birkhead*,(b) *Young* v. *Keighly*;(c) that the plaintiff, by inspecting the documents which were mentioned in the schedule to S. Hodson's answer, might have obtained all the information which formed the ground of the bill in question, and which, he alleged, did not come to his knowledge until after the decree had been carried *into the Master's [*459] office: and that the proper course, in a case of this nature, was to move that the bill might be taken off the file: *Perry Philips*;(d) *Partridge* v. *Usborne*;(e) *The Attorney general* v. *The Fishmongers' Company*;(g) *Milligan* v. *Mitchell*;(h) *Colclough* v. *Evans*;(i) *Crompton* v. *Wombwell*;(k) Story on Plead., p. 270, note.

Mr. *Wakefield* and Mr. *Mylne*, for the plaintiff, said that the bill was neither a bill of review nor a supplemental bill in the nature of a bill of review, as it did not seek to alter a single letter of the decree; but its object was to obtain relief in addition to that which was given by the decree: Mitf. Plead. pages 83 and 84, edition 4th: that, at all events, the bill was regularly filed so far

(a) 2 P. W. 283; and see Mitf. Plead. 91, 4th edit.
(b) 3 Atk. 809.
(c) 16 Ves. 348.
(d) 17 Ves. 173; see 176, 183, 184.
(e) 5 Russ. 195.
(g) 4 Myl. & Cr. 1.
(h) 1 Myl. & Cr. 433; see 447.
(i) Ante, Vol. IV. p. 76.
(k) Ibid. 628.

as it was a bill of revivor; and that the Court might, at the hearing, dismiss so much of it as was supplemental; but could not order it to be taken off the file, more especially as the other defendants had not been served with notice of the motion.—[THE VICE-CHANCELLOR: One defendant may apply against the plaintiff, without serving the other defendants with notice of the application.]

With respect to the cases which had been cited, the plaintiff's counsel said that in the anonymous case in Peere Williams, not a single fact was stated, and the motion to dismiss the bill did not succeed: that *Young* v. *Keighly* did not apply, as it was an application for leave to file a bill of review, and not [*460] to take a bill of *review off the file because it had been filed without the leave of the Court: that the passage in Lord Eldon's judgment for which *Perry* v. *Phelips*, had been cited, "or, as in the late case of *Youny* v. *Keighly*, to an application that it might be taken off the file," was clearly a mistake; for the application in *Young* v. *Keighly*, was for leave to file a bill of review: that *Wortley* v. *Birkhead* and *Partridge* v. *Usborne*, were in the plaintiff's favor; for they showed that the proper course was to demur to the bill, and not to move that it might be taken off the file: that, in *The Attorney-general* v. *The Fishmongers' Company*, Lord Cottenham did not say that leave was necessary to file a supplemental bill for the purpose of putting new matter in issue, but stated the proposition hypothetically :(*a*) that, in *Milligan* v. *Mitchell*, the cause was in so advanced a stage that the bill could not be amended without leave; and leave was given to amend, but by adding parties only; the plaintiff, however, introduced new matter into the bill; and the bill was ordered to be taken off the file, because he had amended his bill to an extent which the permission given him did not warrant: that *Crompton* v. *Wombwell* was in the plaintiff's favor, for there the supplemental bill did not seek to make a new or different case, and, on that ground, the demurrer to it was overruled: that *Colclough* v. *Evans* did not apply, as the supplemental

(*a*) See 4 Myl. & Cr. p. 9 & 10.

bill in that case, sought to change, entirely, the issue raised by the original bill, and, on that ground, the demurrer to it was allowed.

Mr. *G. Richards* replied.

*THE VICE-CHANCELLOR:—In this case a motion was [*461] made, by the defendant Ball, to take a bill off the file for irregularity. The irregularity alleged was that, in substance, the bill was a supplemental bill in the nature of a bill of review. The motion was opposed on two grounds. First, that it was not a supplemental bill in the nature of a bill of review; and, secondly, that, if it were, the form of the application was wrong.

Now whether it is or is not a supplemental bill in the nature of a bill of review, depends on what is contained in it.

The original bill, as appears on the face of the bill in question, was filed by a person who claimed under the will of John Hodson; and Ball, the party who makes the application, and a person of the name of Richardson, were made defendants to it; and it asked an account, as far as they were concerned, of the testator's personal estate. It appears that some supplemental bills and bills of revivor were subsequently filed, which did not affect Ball. Then a decree was made, in the year 1839, which directed, in the common form, that an account should be taken of the personal estate. By the words "common form," I mean the decree did not direct the account to be taken with a view to make the accounting parties responsible for what they might have received, but for their wilful default. Then the plaintiff filed the bill in question, and, after stating those matters, he alleges in it that, after the decree, he, for the first time, discovered, contrary to what he had before supposed, certain circumstances, which appear to be such as, if they were made out, would have justified a decree in the terms of making the executors responsible for what, but for their wilful *default, they [*462] might have received. Then, though no expression is used, such as, "review," yet the bill proceeds to ask, as far as Ball is concerned, that, on taking the accounts, Ball and the estate of Richardson, who had previously died, ought to be charged with all such sums of money as, but for their wilful de-

fault or neglect respectively, might have been received by them. And it also prays that they may be made responsible for so much as the estate of Elizabeth Hodson, their co-executrix, may prove deficient to answer what may be found due in respect of her default and mismanagement of the testator's estate. In effect, therefore, this bill does ask that a decree may be made, which is inconsistent with the original decree; and, therefore, although it does not mention the term, "review," yet it is, to all intents and purposes, a supplemental bill in the nature of a bill of review; and, consequently, it ought not to have been filed without the leave of the Court; and the leave of the Court was never asked.

The only point that remains to be considered, is whether the application is right in point of form? Now it is observable that the present Lord Chancellor, when he gave judgment in that very singular case of *Partridge* v. *Usborne*, says, speaking of the case of *Palmes* v. *Danby*, which was decided in 1695: "Since that time—a period of more than a century—it does not appear that there are any other decisions relative to the point,"(*a*) that is, the filing of a bill of review. So that, in no instance, for above one hundred years, has the rule, in this respect, been dispensed with. It is certainly true that very little in the way of decision is to be found respecting bills of review, after a period [*463] of nearly a century *back; and, therefore, a question might well arise as to what is the proper course to be pursued.

Now Lord Eldon, in the case of *Perry* v. *Phelips*, has certainly expressed his opinion as to what the course of proceeding ought to be; although I admit that the observation which Mr. Wakefield made, when that case was mentioned, is correct, namely, that there has been a mistake made either by Lord Eldon, with reference to what had been done in *Young* v. *Keighly*, or by the reporter. There is, however, no ground for supposing that Lord Eldon did not say: "It must be open to plea or demurrer, if known to the forms of the Court: or, as in the late case of *Young* v. *Keighly*, to an application that it may be taken off the file." In *Partridge* v. *Usborne* there had been a discussion, before the

(*a*) 5 Russ. 249.

Lord Chancellor, whether or not there should be leave given to file a supplemental bill in the nature of a bill of review. The Lord Chancellor reserved his judgment upon the point; and, before he had decided it, the plaintiff took upon himself to file a supplemental bill in the nature of a bill of review; whereupon, a motion was made that that bill might be taken off the file. Now I observe that, throughout the argument which was adduced on the part of the plaintiff against that motion, it is not once suggested that the motion itself was wrong in point of form; and, when the Lord Chancellor gives his judgment upon the motion, he throws out not one word indicating an opinion that the motion was wroug in point of form; and, therefore, I conceive that the course that was adopted by the parties in *Partridye* v. *Usborne*, as well as the expression of Lord Eldon, do warrant the application, namely, to take the bill off the file.

In the course of the argument reference was made to an anonymous case in 2 P. W. page 283; but which *turns [*464] out to be *Davies* v. *Larmar*, argued on the 3d of June, 1725. The report in Peere Williams, commences with a dissertation, by the Reporter, on the state of the law; then he says: "But in the present case, the plaintiff having deposited the 50*l*., and annexed an affidavit, to the bill, that the deed on which the bill of review was founded, did first come to the plaintiff's knowledge after the pronouncing the decree, the Court allowed the bill of review, upon the plaintiff paying the costs of the defendants' motion, which was to dismiss the bill for that it was filed without the leave of the Court." It was said that that was not correct. But I have procured a copy of the order in that case, which was made by Lord Chancellor Macclesfield, on the 3d of June 1725, and it appears to be this: "Upon opening of the matter this present day unto this Court by Mr. *Lutwich*, being of the defendants' counsel, in the presence of Mr. Attorney-general, and Mr. *Williams*, of counsel for the plaintiff, it was alleged that the defendants having obtained a decree against the plaintiff, touching the matters in question, the plaintiff, to delay the said defendants' receiving the benefit thereof, exhibited an original bill against the defendants, thereby seeking to impeach the said

decree, which being contrary to the rules of the Court, the said defendants put in a demurrer thereto, which on arguing was allowed. That the plaintiff, on pretence of a discovery of new matter, has since exhibited a bill of review, against the defendants, and has deposited the sum of 50*l.*, with the Registrar, according to the rule, but did not, before the exhibiting such bill, obtain an order for leave to bring the same, which he ought to have done: therefore, and for that the plaintiff hath not paid the defendants the 5*l.* for the costs of their said demurrers being allowed, and in regard the said bill is brought only to delay
[*465] and harass the said *defendants, it was prayed that the plaintiff's said bill of review may stand dismissed with costs. Whereupon and upon hearing the plaintiff's counsel and of what was alleged on both sides, it was ordered that, upon the plaintiff's paying unto the defendants the said 5*l.* costs of allowing their demurrer, and 40*s.* for the costs of this motion, the plaintiff be at liberty to proceed on the said bill of review."(*a*) Now, that plainly shows that the Lord Chancellor thought that the defendants had a case for making the motion. Something also must, of course, have happened, which is not apparent, in consequence of which, after the defendants had been paid the costs of their motion by the plaintiff, (which is an admission that the motion was right at the time when notice of it was given,) the Court thought proper to hear the cause.

Now it should be recollected that the practice has been of late, in various instances where a bill has been filed irregularly, to move that it may be taken off the file: and there is this difference between moving to dismiss, as in the case of *Davies* v. *Lamar*, and the present application, (which is to take the bill off the file,) that the Court is in the habit, according to modern practice, of allowing a bill to be dismissed with costs after it has been regularly filed and something has happened subsequently, which makes it impossible that the suit should go on; as, for instance, in the case of a bill which is not duly prosecuted; although it is admitted to have been rightly filed, yet, if it be not duly prose-

(*a*) Reg. Lib. (A.) 1724, fol. 476.

cuted, then the application is to dismiss it with costs. But, in a case where a bill has been filed without the leave of the Court, or rather I should say against the leave *of the [*466] Court or inconsistent with the leave of the Court, as in the case where the Court has given special leave to amend and a bill has been filed, not according to the permission but embracing other objects and introducing other things than were comprehended in the leave, there the practice is to move that it be taken off the file, for irregularity.

I cannot but think, therefore, that, in substance, the practice which the defendant contends for, is supported by the case of *Davies* v. *Larmer*; and that the opinion of Lord Eldon, coupled with what took place in the case of *Partridge* v. *Usborne*, is quite sufficient to warrant me in saying that the present application ought to be granted.

My opinion, therefore, is that the defendant's case is right, in substance, and that his application is right in point of form. Consequently the bill must be taken off the file, and the plaintiff must pay the costs of the motion.(*a*)

(*a*) Affirmed. See 1 Turn. & Phill. 177.

THOMAS WELD, OF LULWORTH CASTLE, ESQ.
ob. 1810.

- Thomas Weld, late Cardinal Weld, ob. 10th April, 1837, s. p. m.
- Edward Weld, born 1775, ob. at Stonyhurst College, 1796; a bachelor, preparing for holy orders.
- Joseph Weld, became possessor of Lulworth Castle in 1829.
  - Edw. Jos. Weld, married since testator's death, and has one son.
  - Thos. Weld, the plaintiff, who has taken the name of Blundell, as required by the will of the testator; since married to Theres. Vaughan. No issue living.
  - Joseph Weld, not married in testator's lifetime.
- John Weld, born 1780, died 1816, a priest.
- Wm. Weld, born 1781, died 1782.
- Hum. Weld, born 1783; living.
  - Charles Weld,
    William,
    Frederick,
    Edmund.
- James Weld, born 1785; living.
  - Hry. Thos. Weld,
    Francis Joseph,
    Philip George.
- Geo. Weld, born 1786; living,
  - John Weld,
    George,
    Arthur Thomas,
    Alfred,
    Walter,
- Fran. Weld, born 1787; died 1788.
- Cather. Weld, born 1778; married to Lord Stourton.
  - William Stourton,
    John Stourton,
    Marmaduke Stourton.
- Elizabth. Weld, born 1789; married to Chas. Bodenham, esq.
  - Bodenham.
- Theresa Weld, born 1782, ob. 1882; formerly wife of William Vaughan, esq.
  - John Vaughan.
    - HERBERT ALFRED THOMAS VAUGHAN, first tenant in tail in existence under the will.

1841.—Blundell v. Gladstone.

*Blundell *v.* Gladstone. [*467]

1841: 27th, 29th and 30th March.

Testator devised his estates to the second son of Edward Weld, of Lulworth, Esq., for his life, with remainders to his sons, successively, in tail male, with like remainders to the third and other sons (*except the eldest*) of the said Edward Weld, and their sons, with remainders to the first and other sons of each brother (*except the eldest brother*) of the said Edward Weld, successively, in tail male, with remainders to the second and other sons (except the eldest) of Lady Stourton, one of the sisters of the said Edward Weld, successively, in tail male.

The will was dated in 1834, and the testator died in 1837. There was not, either at the date of the will or at the testator's death, any such person as Edward Weld of Lulworth: but it appeared, from evidence as to the state of the Weld family, that Joseph Weld was then the possessor of Lulworth; that he had *an elder brother* named Thomas, and had had another brother, Edward, older than himself, who died a bachelor in 1796; that he had two sons, Edward Joseph, his eldest, and Thomas, his second son; and that Lady Stourton was his sister. The question was, whether the second son of Joseph, or of Edward, or of Edward Joseph, was intended to be the object of the first devise. The Court decided in favor of the second son of Joseph.

If a document has not been proved, nor has any order been obtained for proving it, *viva voce*, at the hearing, the Court will not allow it to be proved on the cause being heard, either on the equity reserved, or for further directions.

Charles Robert Blundell, Esq., by his will dated the 28th of November, 1834, gave certain manors and other hereditaments in Lancashire, to John Gladstone, Robert Gladstone and Thomas Robinson, their heirs and assigns: "Upon trust to permit and suffer the second son of Edward Weld, of Lulworth in the county of Dorset, Esq., to occupy and enjoy the same, and to take to his own use, the rents and profits thereof, for and during his natural life, without impeachment of waste, and, from and after his decease, then upon trust for the first and every other son of the said second son of the said Edward Weld, severally, successively and in remainder, one after another according to the priority of their respective births, and the heirs male of the body and respective bodies of every such son; and, for default of such issue, upon trust for the third and every other son and sons (except the eldest) of the said Edward Weld, severally, successively and in remainder, one after another accord-

[*468] ing to the priority of their *respective births, and for the male issue of each son, in tail mail, but in as strict settlement on each such son and his respective male issue in tail male, as the rules of law or equity will allow; and, for default of such issue, upon trust for the first and every other son of each brother, (except the eldest brother) of the said Edward Weld, severally, successively and in remainder, one after another according to the priority of the respective birth of such son and sons, and for the male issue of each such son in tail male, the son and sons of the elder of such brothers of the said Edward Weld and his and their respective male issue being preferred to and taking before the son and sons of the younger of such brothers of the said Edward Weld, but, nevertheless, in as strict settlement on every such son respectively, and his male issue in tail male, as the rules of law or equity will allow: and for default of such issue, upon trust for the second and every other son and sons (except the eldest) of Lady Stourton, the wife of the right honorable William Lord Stourton, and one of the sisters of the said Edward Weld, successively and in remainder, one after another according to the priority of their respective births, and the issue male of each such son in tail male, but in as strict settlement on every such son, and his respective male issue in tail male, as the rules of law or equity will allow; and, for default of such isssue, upon trust for the first and other son and sons of all the other sisters of the said Edward Weld, severally, successively and in remainder, one after another, according to the priority of the respective birth of such son and sons, and for the male issue of each such son, in tail male, the son and sons of the elder of such sisters, and his and their respective male issue, being preferred to, and taking before the son and sons of the younger of such sisters of the said Edward Weld,

[*469] *but, nevertheless, in as strict settlement on every such son successively and his respective male issue, in tail male, as the rules of law or equity will allow; and for default of such issue, upon trust for the first and other son and sons of the eldest and every other daughter and daughters in succession of the said Edward Weld, severally, successively and in remain-

der, one after another according to the priority of the respective birth of such son and sons, and for the male issue of each such son, the elder daughters' son and sons, and his and their male issue, being preferred and taking before every younger daughter's son and sons, but, nevertheless, in as strict settlement on each such son and his male issue, in tail male, as the rules of law or equity will allow; and, for default of such issue, upon trust for Henry Mostyn, of Usk in the county of Monmouth, solicitor, for his life; and, after his decease, upon trust for the first and every other son of the said Henry Mostyn, severally, successively and in remainder one after another according to the priority of their respective births, and the heirs male of the body of every such son lawfully issuing."

The testator then directed that the person for the time being beneficially entitled to the actual possession of his real estates under the trust aforesaid, should reside in his mansion-house, and keep the same and the gardens, hot-houses, and appurtenances, in good repair and condition, and should, immediately on coming into possession, or, if then under age, within one year after being of age, take the name and arms of Blundell; and that his furniture, plate, linen, china, glass, carriages, statues, &c., should be held, by his trustees, as heir-looms.

The testator died on the 30th of October, 1837.

*There was no other person, either at the date of the [*470] will or at the testator's death, who correctly answered the description of: "Edward Weld of Lulworth," as will be perceived on referring to the pedigree. The person who was in possession of Lulworth at both those periods, was named Joseph Weld. His eldest son was named Edward Joseph, but commonly used and was known by the name of Edward only. His second son was named Thomas, and was the plaintiff in the suit. He had taken the name of Blundell, in compliance with a direction in the will.

In support of the plaintiff's case, it was proved that the testator, when he gave his solicitor instructions to prepare his will, called the possessor of Lulworth by the name of Edward Weld; and that he was but imperfectly acquainted with the christian

names of the members of the Weld family; that, in the course of conversations which took place between him and certain of the other witnesses, as well prior as subsequent to the date of his will, he repeatedly called the possessor of Lulworth by the name of Edward; and that, in 1836 or 1837, he told one of the witnesses that he had left his real estates to the second son of Edward Weld of Lulworth Castle, in life rent, and stated that he had never seen the second son, and did not know his christian name.(*a*)

The sanity of the testator having been called in question, an issue, *devisavit vel non*, was directed at the hearing of
[*471] the cause; and, the jury having found in *the affirmative, the cause now came on to be heard on the equity reserved.

The principal question was: Who was intended, by the testator to be the object of the first trust in his will.

Mr. *Jacob* and Mr. *Macdonnell*, for the plaintiff:

There was no member of the Weld family whose name was Edward, except an elder brother of Joseph, the present possessor of Lulworth. He, however, died in 1796, which was nearly 40 years before the will was made. Moreover, he had no issue; and, as he intended to become a priest of the Romish church, there was no probability of his having issue. He, therefore, could not be the person whose second son was intended to be the first equitable tenant for life under the will.

Neither could Edward Joseph Weld be that person: for, in the first place, he does not, accurately, answer the description of Edward Weld of Lulworth; inasmuch as his name was Edward Joseph, and not Edward, and he was not the possessor of Lulworth. Secondly: the first trust in the will, was intended to take effect in possession; but Edward Joseph Weld was a bachelor at the testator's death. Thirdly: Lady Stourton is

(*a*) Other parts of the evidence are either stated or alluded to in the argument, The Vice-Chancellor, however, decided the case on the expressions used in different parts of the will, without regard to any portion of the evidence, except that which showed the state of the Weld family at the date of the will.

mentioned, in the will, as being the sister of the person whose second son was to be the first *cestui que trust.* Now Lady Stourton is the aunt, and not the sister of Edward Joseph Weld. Fourthly: the same person is mentioned as having an elder brother; but Edward Joseph Weld never had an elder brother.

Joseph Weld answers the description, in every particular, except that he is called Edward instead of Joseph; *which is clearly a mistake. He was the possessor of [*472] Lulworth: he had a second son living at the date of the will, and at the testator's death: Lady Stourton was his sister; and he had an elder brother living at the date of the will, namely, Thomas Weld, the Cardinal.

The evidence that has been given for the plaintiff, and especially, the evidence of what the testator said to his solicitor when he gave instructions for his will, puts the question beyond all doubt. The following cases show that evidence of conversations and other matters *dehors* the will, is admissible to show what the testator meant, where there is either no person who correctly answers the description of the devisee or legatee, or no property which accurately corresponds with that which the will purports to dispose of. *Pitcairn* v. *Ogbourne*;(a) *Beaumont* v *Fell*;(b) *Stockdale* v. *Bushby*;(c) *Dowset* v. *Sweet*;(d) *Parsons* v. *Parsons*;(e) *Day* v. *Trig*;(g) *Door* v. *Geary*;(h) *Dobson* v. *Waterman*;(i) *Penticost* v. *Ley*;(k) *Garvey* v. *Hibbert*;(l) *Doe* v. *Martin*;(m) *Lowe* v. *Lord Huntingtower*,(n) *Doe* v. *Jersey*;(o) *Doe* v. *Huthwaite*.(p)

Mr. *Macdonnell* cited *Heming* v. *Whittam*,(q) *Herbert* v. *Reid*,(r) *Thomas* v. *Steward*.(s)

(a) 2 Vez. 375.
(b) 2 P. W. 141.
(c) 19 Ves. 381.
(d) Ambl. 175.
(e) 1 Ves. jun. 266.
(g) 1 P. W. 286.
(h) 1 Vez. 255.
(i) 3 Ves. 308, n.
(k) 2 Jac. & Walk. 207.
(l) 19 Ves. 125.
(m) 4 Barn. & Adol. 771.
(n) 4 Russ. 532, n.
(o) 3 Barn. & Cres. 870.
(p) 3 Barn. & Ald. 632.
(q) Ante, Vol. II. p. 493.
(r) 16 Ves. 481.
(s) 7 T. R. 144, n.

the cases; and it being doubtful there which testator meant; and, therefore, when admitted in that case, it is not to contradict the words of the will, but to let in light so far agreeable to the words as to enable the *Court to support the act done." *Doe* v. *Lyford*,(a) *Doe* v. *Chichester*,(b) *Doe* v. *Hiscocks*. In the judgment in *Miller* v. *Travers*,(c) there is the following passage, which shows that the rule as to the admissibility of parol evidence is as we have contended it to be. "Upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary they will all be found consistent with the distinction above adverted to,—that an uncertainty which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself."

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Mr. *G. Richards* and Mr. *Vansittart Neale*, for Lady Stourton's sons: We contend that the person intended by the testator, was Edward Joseph Weld; and, as he was not married at the testator's death, and has only one son at the present time, the estates vested on the testator's death, and still remain in Lady Stourton's second son.

If a legacy is left to a person who has two christian names, and the testator happens to mention only one of them, is that a ground for depriving him of his legacy, or for admitting parol evidence to show that some one else was intended to take the legacy? Edward Joseph *Weld is sufficiently identified by being called Edward Weld; more especially as he was generally known by and used the name of Edward only. The words, "one of the sisters of the said Edward Weld," are words of description merely. Besides, there is as much reason for saying that the testator by mistake described Lady

[*477]

(a) 4 M. & S. 550. (b) 4 Dow. P. C. 65. (c) See 8 Bing. 251.

Stourton as the sister of Edward Joseph Weld, as there is for saying that he called Joseph, Edward by mistake. The cases that have been cited for the plaintiff, are no authority for admitting parol evidence in the present case. In *Beaumont* v. *Fell*, *Day* v. *Trig*, and *Penticost* v. *Ley*, parol testimony was admitted because there was either no person or no property to answer the words of the bequest. In *Doe* v. *Huthwaite*, the testator called Stokeham Huthwaite the second son, and John Huthwaite the third son of J. Huthwaite, whereas John was the second and Stokeham the third son. So that, in that case, the words of description contradicted the names; but that is not so here.

Mr. *Neale* referred to *Mason* v. *Robinson*.(a)

Sir *William Follett*, Mr. *Wigram*, and Mr. *Fleming* for Lord Camoys, the testator's heir: We submit, that under the trust in question, the plaintiff is not entitled.

The correct rule of law as to the admissibility of parol testimony, is that it may be admitted to show either what property the testator intended to give, or to whom he intended to give it. It is admissible only *in a case of equivocation; [*478] that is, where either two properties or two persons are found answering the description in the will. It must be a completely accurate description, applying equally to two or more persons; but, if that is not the case, parol evidence is not admissible. The case of *Doe* v. *Hiscocks* is an illustration of this. There the devise was, "to John Hiscocks, eldest son of the said John Hiscocks," who was the son of the testator. The fact was, that Simon Hiscocks was the eldest son, and John Hiscocks was the second son of the testator's son; and the Court of Exchequer refused to receive extrinsic evidence, in order to show to which of the two sons the testator intended to give the property; because the words did not accurately apply to either of them. (Wigram on Extrinsic Evid. pages 54 and 104.) *Miller* v. *Travers*. If there had been no person answering the description of

(a) 2 Sim. & Stu. 295.

The only part of the will which we are to look at, is that which contains the devise or limitation, and there we find that the party in whose favor the devise or limitation is made, is described as the second son of Edward Weld
[*481] *of Lulworth, and we find that there was a person answering the description of E. Weld of Lulworth, and, therefore, it cannot be said to be a mistake. No part of the description applies to Joseph Weld, except that he was of Lulworth. It was said that, in a subsequent part of the will, there is a limitation in favor of the first and other sons of each brother (except the eldest) of Edward Weld, and that Edward Joseph Weld never had an elder brother. The words of that limitation, however, are as inapplicable to Joseph Weld, as they are to his eldest son; for Thomas Weld, who afterwards became Cardinal Weld, was a priest of the Romish church, and, therefore, could have no issue. Besides, the exception of the eldest brother is no part of the description of the party in whose favor the limitation is made. That limitation is not made to A. B. having an elder brother: the exception is contained in a distinct and separate sentence. The same observations may be made with respect to the naming of Lady Stourton as the sister of Edward Weld. That circumstance may, perhaps, affect the limitation for the benefit of Lady Stourton's sons, but it cannot affect the trust in favor of the second son of Edward Weld: for, if it did affect it, then an inaccurate description of one party would make a prior accurate description of another party, inaccurate. Suppose that the devise had been to the second son of Joseph Weld, and, in a subsequent part of the will, the testator had called Lady Stourton his aunt, would that have made the first description inaccurate? 2 Powell on Devises, Jarman's edit. p. 7. Why are we to conclude that the mistake is in the devise to the second son of Edward, rather than in the devise to Lady Stourton's sons? In *Jones* v. *Colbeck*,(a) the
[*482] *Master of the Rolls lays it down that, if there is a gift to a person by the description which applies to that

(a) 8 Ves. 38; see p. 42.

person exclusively, you are not, by inference and argument from other parts of the will, to control the effect of a positive bequest. Here there is a positive devise to the second son of Edward Weld; and that devise is not to be affected by a subsequent part of the will in which another devisee is described as standing in a degree of relationship to Edward Weld which she does not bear. In *Right* v. *Compton*,(a) Lord Ellenborough, C. J., in delivering the judgment of the Court, says: "That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus, et consequentibus*, is one of the most prominent canons of testamentary construction; yet, where, between the parts, there is no connection by grammatical construction or by some reference express or implied, and where there is nothing in the will declarative of some common purpose from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, perfect in itself and without ambiguity, and not militating with any other provisions respecting the same subject matter." We submit, therefore, that, in this case, it is not part of the descriptions of the devisee that he should be the second son of a person who was a brother of Lady Stourton; and also, that the testator might as well have made a mistake in calling Lady Stourton a sister of Edward Weld, as in calling Joseph Weld, Edward. Supposing, however, that every thing which is found in the will relating to Edward Weld, is to be

*considered as part of the description of the devisee, [*483] then, as the whole of it is not correctly applicable either to Edward or to Joseph, the devise is void according to *Doe* v. *Hiscocks*.(b) The case of *Thomas* v. *Thomas*,(c) sup-

(a) 9 East, 267.

(b) In *Doe* v. *Hiscocks* the Court of Exchequer decided, not that the devise was void, but that the evidence which, it must be observed, consisted of the instructions given, by the testator, for his will, and declarations made by him after its execution, were not receivable.

(c) 6 T. R. 671.

ports the same proposition. It may be inferred, from the judgment in *Beaumont* v. *Fell*, that the Court would not have decided as it did, if there had been more than one person who claimed the legacy. *Delmare* v. *Robello*.—[THE VICE-CHANCELLOR: There the gift was to the children of the testator's two sisters Reyne and Estrella. The testator had a sister named Reyne, and a third sister named Rebecca; and the question was whether evidence should be admitted to show that the testator, when he named Reyne, meant Rebecca; that is, to show that there was a mistake, the gift being clear.]—In *Andrews* v. *Dobson*,(a) there was a bequest to James, son of Thomas Andrews of Eastcheap, printer. There was no Thomas Andrews in Eastcheap; but there was a James Andrews, a printer, there, and he had a son, Thomas, by his first wife, who was related to the testator, and a son, James, by his second wife, who was not related to the testator. Thomas claimed the legacy, insisting that the testator meant Thomas the son of James, instead of James the son of Thomas: but the Court refused to direct any inquiry on the subject, and dismissed the bill. *Doe* v. *Needs*,(b) was a case of clear equivocation. All the cases are consistent in [*484] deciding that, if any part of the description equally applies to two persons, the Courts cannot carry the testator's intention into effect. We submit, therefore, that the plaintiff is not entitled to the testator's estates.

Mr. *Wigram* cited *Wilkinson* v. *Adam*;(c) *Fraser* v. *Pigott*;(d) *Lewis* v. *Lewellyn*;(e) *Jones* v. *Tucker*;(g) *Jones* v. *Curry*;(h) *Webb* v. *Honnor*;(i) *Hampshire* v. *Pierce*;(k) *Strode* v. *Russell*;(l) *Pocock* v. *The Bishop of Lincoln*;(m) *Doe* v. *Oxenden*;(n) *Mounsey* v. *Bla-*

(a) 1 Cox, 425.
(b) 2 Mees. & Wels. 129.
(c) 1 Ves. & B. 422.
(d) 1 Younge, 354.
(e) Turn. & Russ. 104.
(g) 2 Mer. 533.
(h) 1 Swans. 66.
(i) 1 Jac. & W. 352.
(k) 2 Vez. 216.
(l) 2 Vern. 621; 8 Vin. Abr. 494, pl. 23.
(m) 3 Brod. & Bing. 27.
(n) 3 Taunt. 147.

mire;(a) *Doe* v. *Bower*;(b) *Delware* v. *Robello*;(c) *Doe* v. *Westlake*; (d) *Doe* v. *Southern*;(e) *Doe* v. *Needs*.

Mr. *Skirrow*, Mr. *Girdlestone*, Mr. *Parry*, and Mr. *Bagshawe*, appeared for the other parties.

Mr. *Jacob*, in reply, said that, taking the whole of the will together, there could be no doubt that the testator intended the second son of Joseph Weld to be the first *cestui que trust* under his will; and, therefore, there was no necessity for resorting to any evidence, except for the purpose of placing the Court in the same situation, with reward to knowledge of the objects of testator's bounty, as the testator himself stood in at the time when he made his will;(g) and that the Court, in every case where it was called upon to construe a will, *was entitled to have evidence produced for that purpose: that, from the language in which the trust in the will was expressed, and from the directions as to taking the testator's name and arms, as to residence in his mansion-house, and as to the furniture, &c., it was clear that the testator meant the object of that trust to be an existing person; and that he did not contemplate that there would be any vacancy in the enjoyment of his estates at his death: that, according to the argument for the defendants, the testator had made three mistakes; but, according to the argument for the plaintiff, he had made only one, and that a very common one, namely, a mistake as to a Christian name. [*485]

The Vice-Chancellor:—This is a very simple case. I have listened to all that has been said, both by way of observation on the will and on the cases that have been cited, and my opinion is that this case is quite within the rule which is laid down in *Miller* v. *Travers*; and, that it may be decided with the greatest facility and satisfaction, without adverting to what was laid down in *Doe* v. *Hiscocks*.

(a) 4 Russ. 384.
(b) 3 Barn. & Adol. 453.
(c) 1 Ves. jun. 412.
(d) 4 Barn. & Ald. 57.
(e) 1 M. & S. 299.
(g) See Wigram on Ext. Evid. 51, *et seq.*

The sole question is, who was the person described as, "Edward Weld, of Lulworth, in the county of Dorset, esquire." That is the sole question, and, for the purpose of determining it, I shall only advert to the evidence which has been given, and very properly given, of the state of the Weld family, entirely rejecting from my consideration everything else *dehors* the will, that can be at all said to bear upon what the testator's intention was.

I look only at the facts of the case, namely, at those
[*486] facts which show the state of the Weld *family at the date of the will, and what the testator has said in his will.

I find then these facts, about which there is no dispute, namely, that Mr. Joseph Weld, the present owner of Lulworth Castle, had, at the time the will was made, an elder brother living, who was named Thomas; and that he had had a brother of the name of Edward, who, in 1796, was being educated for holy orders in the Romish church, and died at the age of 20 or 21. Mr. Joseph Weld has two sons, Edward Joseph Weld, for whom counsel appear in this cause, and Thomas Weld, who is the plaintiff in the suit: and he has also a sister, Lady Stourton. Then, those things being so, I look at the will, not merely at one line but at every part of it, for the purpose of determining the meaning of that part of it, the construction of which is disputed. I take that to be the legitimate mode of construction; whether it be a question who shall be the person to take, or what is the thing to be taken, or what is the interest to be taken in it. And, in so doing, I merely follow the rule which is laid down in *Miller* v. *Travers*.

I find then, in this will, that, after the devise of the legal estate in fee to trustees, the testator declares the trusts to be, to permit and suffer the second son of Edward Weld, of Lulworth, in the county of Dorset, esquire, to occupy and enjoy the same for his life: then there is a trust for the first and every other son of the said second son of the said Edward Weld successively in tail male, on which nothing arises. Then, in default of such issue, there is a trust for the third and every other son and sons (except the eldest) of the said Edward Weld, on which also nothing

arises. Then, in default of issue, there is a trust for the first and every *other son of each brother (except the [*487] eldest brother) of the said Edward Weld; and, for default of such issue, upon trust for the second and every other son and sons (except the eldest) of Lady Stourton, the wife of the Right honorable Wm. Lord Stourton and one of the sisters of the said Edward Weld, successively, in tail male. There is nothing material in the rest of the will, except that it is manifest, on the face of it, that the testator intended the first trust to take effect in possession immediately after his death.

I am, therefore, to consider this will in the same manner as if the testator, when he spoke of Edward Weld of Lulworth in the county of Dorset, esquire, had described him as having an elder brother, and as being, himself, the brother of Lady Stourton. I will take it then that, in this will, there is a devise in trust for the second son of Edward Weld of Lulworth in the county of Dorset, esquire, who has an elder brother, and who is, himself, the brother of Lady Stourton.

It is said that that devise cannot by any means mean the the second son of Joseph Weld of Lulworth in the county of Dorset, esquire; because it appears as a fact that he has a son named Edward Joseph, and that, for ordinary purposes, he is called Edward; but it is also proved that, on solemn occasions, the gentleman in question, writes his name, Edward Joseph. It is to be observed too, that, though it may be very true that the description of Edward, might be a sufficient description of Mr. Edward Joseph Weld for some purposes, yet that the name Edward given solely to him, is not the perfect and accurrate description of him by name. Then this is to be further observed, that not only he is not *designated fully and [*488] accurately by name, but he does not at all answer the description of having an elder brother, or as being, himself, a brother of Lady Stourton. In answer to that, it was said that Mr. Edward Joseph Weld, though erroneously designated with respect to his Christian name, was correctly described as of Lulworth in the county of Dorset, esquire. I admit that it might be very well to describe Mr. Edward Joseph Weld, as Edward

Weld of Lulworth, in the county of Dorset, esquire, for some purposes: but here the testator is making a disposition of his estates, and is evidently speaking of some person who was to be the *stirps* from whom the takers were to arise. Besides, I find that the person whose second son was to succeed the testator in the enjoyment of his estates, was a person who had an elder brother and was, himself, a brother of Lady Stourton. Therefore, I have, on one side, a sufficient designation for some purposes, (but not a full and accurate one,) of one person with two circumstances attached to it and describing him, but which by no means suit him; and, on the other side, I have a designation of a person which is inaccurate: but the two other circumstances of description so suit and point to that person as not to leave, in my mind, the shadow of a doubt that he was the person whom the testator intended to describe.

I decide this case upon the words of the will, coupled with that evidence only which has been given as to the state of the Weld family at the date of the will, and which, I think, is the only part of the evidence which ought to be received. I have thought of the question a good deal from the time when the hearing of the cause commenced; and it seems to me [*489] that no advantage *would arise from sending a case for the opinion of the Judges of a Court of Law, but that the question can be satisfactorily decided in this Court.

If I had had the least doubt on the question, I certainly should have acted as a Judge of this Court, who entertains a doubt, ought to do; and have sent a case to a Court of Law: but the case seems to me to be a very simple one, and wholly free from doubt: and I think it due to the feelings of the parties and to justice, that I should declare my opinion at once.(*a*)

The will of 1827, mentioned ante page 480, was not proved, nor had any order for proving it been obtained, when the cause

(*a*) The *Lord Chancellor*, assisted by Mr. *Justice Patteson* and Mr. *Justice Maule*, affirmed the above decision in H. T. 1843.[1]

[1] This case, on appeal, is reported, (1 Phil. 279.) The report there contains, in full, the opinion of Mr. Justice Patteson and the Lord Chancellor.

was heard originally; but Lord Camoys's counsel proposed to prove it, *viva voce*, as an exhibit, at the hearing reported above.

THE VICE-CHANCELLOR, however, would not allow the document to be proved; because the cause was substantially before him for further directions, and, therefore, the Court could not allow any exhibit or other matter to be given in evidence, which was not proved, or for the proving of which an order had not been obtained when the cause was heard.

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*HOUGHTON *v.* HOUGHTON. [*491]

1841: 16th and 25th January, and 15th April.

Two brothers, A. aud B., entered into co-partnership without articles, and purchased land for the purposes of their trade, with money borrowed from C., and had the land conveyed to themselves in moieties, to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir: B. then took D. into partnership. Each of the firms erected trade buildings on the land, and paid for them and for the insurance on them, and also paid the interest on the mortgage-money out of their partnership funds. Ultimately, B. and D. paid off the mortgage out of their partnership property, and took a re-conveyance of the land to themselves as joint tenants in fee. B. died, and his heir, who was also the heir of A., claimed the land; but the Court held that it was converted into personalty, and dismissed the bill.

IN 1812, William Houghton and his brother James, entered into co-partnership, as soap-boilers, at Liverpool; but it did not appear that any articles of partnership were executed by them, or that the partnership was entered into for any definite term. In March, 1816, they agreed to purchase, of W. MacIver, for 800*l.*, a piece of land in Liverpool, which they had previously rented and used for the purposes of their trade; and, by indentures of the 15th and 16th of that month, one moiety
*of the piece of land was conveyed to uses for the bene- [*492]
fit of James and his heirs, in the usual way to bar dower; and the other moiety was conveyed to like uses for the bene-

fit of William and his heirs. William and James borrowed the 800*l.* from James, their father; and, by indentures of the 18th and 19th of March, 1816, they appointed and conveyed the piece of land to their father in fee, by way of mortgage for securing the re-payment of the 800*l.* with interest. Afterwards, William, and James the son, erected buildings and other works upon the piece of land, for the purposes of their trade: and they paid the expense of those erections, the insurance on them, and the interest of the 800*l.*, under the name of rent, out of their partnership funds. In June, 1824, William died intestate, and without issue, leaving James, his eldest brother, his heir at law; but no person took out administration to his estate. James, the father, was entitled to his deceased son's personal estate after payment of debts. He, however, did not take possession of it, but suffered his six surviving children to treat it as their property. Immediately after William's death, James, the son, took John, another of his brothers, into partnership with him; but no articles of partnership were executed, nor was any time fixed for the duration of their partnership. James and John erected warehouses and other buildings on the piece of land, for the purposes of their trade; and defrayed the expense, and made the other payments before mentioned, out of the funds of their partnership. On that occasion, William's share of the partnership assets, which constituted the whole of his property, was valued at 3,000*l.*, and John became the owner of it by paying an equal share of that sum to each of his surviving brothers and sisters. It appeared from John Houghton's answer, and from the evidence
[*493] in the cause, that in the *3,000*l.* was included 600*l.*, as the value of William's interest in the piece of land and the works thereon.

In July, 1827, James the father, died, having, by his will, dated in June preceding, given all his real and personal estate and effects to his surviving children, except James, their heirs, executors, &c., equally as tenants in common, and appointed them the executors and executrixes thereof. Two of them, Thomas and Alice, proved the will.

On the 12th of May, 1831, the testator's children came to a

final settlement of all their family affairs; and, by an indenture dated the 14th of that month, and expressed to be made between Thomas and Alice and their sisters, Catharine and Margaret, of the one part, and James and John of the other part, after reciting the deeds of the 18th and 19th of March, 1816, the death of William, leaving James, his eldest brother, him surviving, the will and death of James the father, and that James the son and John had agreed with Thomas, Alice, Catherine and Margaret, to pay them 640*l.*, being the sum to which they were entitled in full discharge of all principal and interest due to them on the mortgage, Thomas, Alice, Catherine and Margaret, in consideration of the 640*l.* paid to them by James the son and John, conveyed their interest in the piece of land, to James the son and John, as joint tenants in fee.(*a*) The 640*l.* was paid by James and John out of their partnership effects. The last mentioned deed was executed by all the parties to it except James and John; and the bill alleged that James did not acquiesce in it. That allegation, however, was denied in John's answer, and was disproved by the *evidence. [*494] In October, 1834, James died intestate, leaving the plaintiff, his son and heir: and Susannah Houghton, his widow, took out administration to his estate. The partnership between James and John, continued until the death of James.

The bill was filed against John, Thomas, Alice and Susannah, alleging (amongst other things) that, upon the death of William Houghton, his moiety of the piece of land, subject to the mortgage, descended to his brother James, and that James was entitled to have a moiety of the mortgage-debt paid out of William's personal estate; that James the elder, as the father of William, became entitled to the whole of his personal estate, subject to the payment of his debts including a moiety of the mortgage-debt; but that no person then took out administration to William: that the partnership accounts between James the younger and William, and between James the younger and John, had

(*a*) The deed, as set forth in the bill and admitted in James's answer, purported to convey the entirety of the piece of land.

been lately adjusted and settled: that, upon the death of James the younger, the legal estate of the entirety of the piece of land became and still remained vested in John; but that, upon the death of James the younger, the beneficial interest therein descended to the plaintiff as the heir-at-law of James the younger: that, under the circumstances aforesaid, the plaintiff was entitled to have the piece of land freed and discharged from the mortgage-debt of 800*l.* out of the estate of William as to one moiety thereof, and, as to the other moiety thereof, out of the estate of James the younger; to which, however, Thomas and Alice, as the representatives of James the elder, made some objection; as did also Susannah, as the representative of James the younger; that Alice had obtained letters of administration to William Houghton, and had possessed his assets.

[*495] *The bill prayed for an account of what was due on the mortgage, and that the amount might be paid out of the estates of William and James the younger; and, in order thereto, that an account might be taken of the personal estate of William possessed by James the elder, in his lifetime, and by Thomas and Alice since his death; and that the same might be applied in a due course of administration; and that one moiety of the mortgage-debt might be paid thereout; and that an account might be taken of the personal estate of James the younger, possessed by Susannah, and that the same might be applied in a due course of administration; and that the residue of the mortgage-debt might be paid thereout; and that John might be decreed to convey the legal estate in the piece of land, to the plaintiff and his heirs.

John Houghton, by his answer, denied that, upon the death of his brother James, the beneficial interest in the entirety of the piece of land descended to the plaintiff as the heir at law of his brother James, or that, under the circumstances in the bill mentioned, the plaintiff was entitled to have the same freed and discharged from the mortgage-debt out of the estate of William as to one moiety thereof, and, as to the other moiety thereof out of the estate of James the younger; for that, the land having been purchased by James the younger and William with the partner-

ship capital, and conveyed to them for the purposes of their partnership, became personal property, and, upon the death of William, his moiety passed to his father, who permitted his sons and daughters to divide it among themselves as if they had been William's next of kin; and that all such sons and daughters, except James, became entitled to all the personal estate of their father under his will, including *therein the [*496] personal estate of William, and, therefore, the defendant insisted that the only interest the Plaintiff could have in the piece of land, was as to the moiety of James the younger, as one of his children.

Mr. *Jacob* and Mr. *Koe* for the plaintiff:—It does not appear that there were any articles of partnership between William and James Houghton, or that it was a partnership for any definite time; but, the circumstance which most materially distinguishes this case from those in which the question has arisen whether land belonging to the co-partners is or is not to be considered as personal property, is that the piece of land in question was not purchased out of the assets of the partnership, but with money borrowed from the father of the two original co-partners. The land, too, was conveyed to them to uses to bar dower, which is a mode of limitation not usually adopted with regard to partnership property. The cases on the subject are collected and observed upon by your Honor in *Randall* v. *Randall*,(*a*) and *Cookson* v. *Cookson*:(*b*) and it appears, from them, that land belonging to a partnership is not to be considered as converted into personalty, unless it was bought with partnership money, and the partnership was entered into for a definite time, and under articles containing certain contracts which show that it was intended, by the partners, to be treated and dealt with as part of their stock in trade. *Thronton* v. *Dixon*.(*c*) When Lord Eldon, in *Selkrig* v. *Davies*,(*d*) said that, in his opinion, all property involved in a partnership concern,

(*a*) Ante, Vol. VII. p. 271.
(*b*) Ante, Vol. VIII. p. 529.
(*c*) 3 Bro. C. C. 199.
(*d*) 2 Dow. 230, 242.

ought to be considered as personal, he meant, not that all land on the surface of which trade was carried [*497] *on, ought to be considered as personalty; but that land which was involved in all the contracts and liabilities of a partnership, ought to be considered as personalty. In *Stuart* v. *The Marquis of Bute*,(a) Lord Eldon says: "In cases where persons, engaged in partnership, have bought freehold houses, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract or the will, been held sufficient against the heir." The case of *Townsend* v. *Devaynes*,(b) has been very much misunderstood. There, freehold premises had been purchased for the use of a partnership. One of the partners afterwards died; and the contest was whether the premises were to be sold and converted into personalty. The surviving partner insisted that articles of partnership had been entered into between him and the deceased, by virtue of which the premises were to be sold: but those articles were not forthcoming; and, from the account of the case given by Mr. Montagu, it would appear that there were no such articles. By an order in the cause, it was referred to the Master, to inquire into the circumstances under which the premises were purchased and held; and whether the deceased partner had entered into any contract for the sale of the premises which was binding on his heir. The master made his report without the articles being produced; and certified that the deceased had not entered into any binding agreement for the sale of the premises. It appears, however, from Reg. Lib. 1811, fol. 1248, that, upon the hearing of exceptions to the Master's report, a draft of the articles was read by consent, and Lord [*498] Eldon declared that the whole of the purchase-money *for the premises which the surviving partner had agreed to pay to the executors of the deceased partner, belonged to his

(a) 11 Ves. 657; see 665.

(b) Montagu on Partnership, Vol. 1, note 2 A. 96.

personal estate.(a) In *Phillips* v. *Phillips*,(a) *Sir John Leach, M. R. says, that all property, whatever may be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have, to every intent, the quality of personal estate; and that the case of *Townsend* v. *Devaynes*, is a clear decision to that effect. That proposition, however, is, certainly, laid down too broadly; and it is evident that Sir John Leach was misled by the imperfect statement, to which we have alluded, of the case of *Townsend* v. *Devaynes*. Moreover, it is to be observed, that the proposition applies only to property purchased with partnership capital.

Mr. *Knight Bruce* and Mr. *Sharpe*, for John Houghton: The plaintiff can have no decree, at all events, without further inquiry.

(a) The following account of the case cited above, is given, by Mr. Jacob, from *Reg. Lib. ubi supra*, in a note to his edition of Roper on Husband and Wife, vol. 1, p. 346. In this case, freehold paper-mills and premises had been purchased for the use of the partnership in which the testator was engaged. It was stated, by Devaynes, his partner, that, by a memorandum of agreement between them, on the death of either, the survivor was to have the option of purchasing the share of the deceased as it then stood; and he proposed to buy the testator's share. The executors accordingly agreed to sell it to him for 4,700*l*. The suit was instituted, by the executors, against Devaynes and the heir at law, for a specific performance of this agreement, and praying that the heir might join in the conveyance. The first decree, pronounced at the Rolls, directed a specific performance without prejudice to the claim of the heir. A subsequent order was made, by which, in conformity with the principle of the previous cases, it was referred, to the Master, to inquire into the circumstances under which the premises were purchased and held, and how much, if any, of the 4,700*l*. arose from such part or parts of the premises as was or were personal estate; and whether the testator entered into any agreement for the sale of the premises which was binding on his heir at law. The Master reported that 1,300*l*. of the 4,700*l*. arose from personal estate, and that no binding agreement for a sale had been entered into by the testator. He stated that the memorandum alluded to by Devaynes, had not been found. It appears probable, however, that some such document was afterwards discovered; for, by the decree, the Lord Chancellor, upon hearing the exceptions, and upon reading the affidavit of H. Cooke, and the draft of the articles therein referred to, (which were admitted to be read by consent of all parties,) declared that the whole of the sum of 4,700*l*. was part of the personal estate of the testator.

(b) 1 Myl. & Keen, 649; see 663.

1841.—Houghton v. Houghton.

The cases of *Randall* v. *Randall* and *Cookson* v. *Cookson*, establish, that land does not necessarily become personalty, by being involved in a partnership; but the Court has never said that, whether it is or is not impressed with the character of personalty, depends on contract. The piece of land in question, was bought for the purposes of the trade. The partners built upon it and insured the buildings. The expense of the buildings and of the insurance, was paid out of the moneys of the firm; and every other expense that was incurred with respect to it, was treated as part of the expenditure of the firm.—[The VICE-CHANCELLOR: Was the purchase coeval with the commencement of the partnership?]—No: the original partners first rented the property; but the trade never existed without it, either as rented [*500] or as *purchased property. When William Houghton died, James took his brother John into partnership with him. James was heir to William: but he did not claim William's share of the land. It was valued and paid for by John, as part of the partnership property. In 1827, James, the father, died, having devised all his property to his surviving children, except James. His estate consisted in part of the 800*l.* due on the mortgage; and, in May 1831, a family arrangement was entered into, in pursuance of which James and John, out of their partnership funds, paid, to their brother and sisters, their shares of the 800*l.*, amounting, together, to 640*l.* (the remainder being retained by John, as his share;) and, on the 14th of May, 1831, the brother and sisters re-conveyed the legal estate to James and John, as joint-tenants in fee: consequently, James being now dead, the whole legal estate has become vested in John; and, if James's estate is entitled to any beneficial interest in the property in question, it is on the ground that the property was involved in the partnership. That being so, the plaintiff's bill is out of Court; for he sues, not as the personal representative, but as the heir of James. It is true that the bill alleges that James did not either execute or acquiesce in the deed of the 14th of May, 1831; but it is most distinctly proved that he was a party to the family arrangement, and that he was cognizant of and acquiesced in the deed: and the plaintiff does not pray, by his bill, that it may be set aside.

It was not executed either by James or by John, because they were the grantees under it.

Mr. *Sharpe*:—As the law now stands, wherever land has been purchased out of partnership property and used for partnership purposes, it is converted into personalty; and *on [*501] the dissolution of the partnership, either of the partners may insist on its being sold, and the proceeds, after paying the partnership debts, divided as part of the property of the partnership. *Townsend* v. *Devaynes*, *Phillips* v. *Phillips*, *Broom* v. *Broom*,(a) *Bligh* v. *Brent*,(b) In *Phillips* v. *Phillips*, there were no articles of partnership, and that case is as similar as can be to the present. The decisions in that and the other cases are not impugned either by *Randall* v. *Randall*, or by *Cookson* v. *Cookson*; for, in the former, the land, though purchased out of the partnership funds, was not used for the partnership business; and, in the latter, the land, though used for partnership purposes, was not purchased with partnership property.

Mr. *Rolt* appeared for Thomas and Alice Houghton; and

Mr. *Spence* for Susannah Houghton.

Mr. *Jacob*, in reply, said that the decision in *Phillips* v. *Phillips*, was contrary both to the older and more recent authorities; and, even in supposing it to be right, that it did not apply; for, in the present case, the land was not purchased out of the partnership property: that, at all events, there was no pretence for saying that the land was personalty after the termination of the partnership; all the accounts having been adjusted and settled, and the concerns wound up, without its having been found necessary to sell it. *Cookson* v. *Cookson*.(c)

THE VICE-CHANCELLOR:—There is a great mass of evidence

(a) 3 Myl. & Keen, 443. (b) 2 Youn. & Coll. 268.
(c) See ante, Vol. VIII. pp. 547, 548.

in this case; and, before I decide it, I will read over the evidence and the exhibits.

[*502] *THE VICE-CHANCELLOR:—In this case the plaintiff filed his bill, representing that he, as the heir at law of James Houghton, the younger, was entitled to the inheritance of a certain tenement, upon which a mortgage had been made, and that that mortgage ought to be paid off out of the personal estate of the persons who had created it. And he represented, in his bill, that James Houghton, his father, and William Houghton, his father's brother, in the month of March, 1816, purchased the tenement in question, and had it conveyed to them as tenants in common in the usual way to bar dower; and that, on the 19th of March, they made a mortgage in fee of the tenement to their father, James Houghton the elder, for the sum of 800*l.*, which appears to have been the purchase-meney paid by them for the tenement. Then the bill represented that William Houghton died in the year 1824, and that the equity of redemption in one moiety descended on James, who was the eldest brother of William. It then represented that the father, who had the legal estate, devised it so as to vest it in his two other sons, John and Thomas, and his three daughters. The bill then alleged that the mortgage was paid off, and that the legal estate was conveyed to James the younger, and to John; but that James did not acquiesce in that conveyance. The bill then stated the death of James, and the descent to the present plaintiff, who is his heir at law of the whole beneficial interest in the tenement.

Now, to meet that case, (which, it is observable, was supported by no proof whatever, except the mere fact that the plaintiff filled the character in which he sued,) this case was set up; namely, it was, first of all, said that the tenement in question was purchased by James and William, (who carried on the [*503] business of soap-manufacturers,) *for the purposes of their trade; that William died, in the year 1824, without issue, unmarried and intestate; and, though his personal estate, (that is to say, the clear residue of his personal estate,) belonged in law to his father, yet that father did not take it to

himself, but allowed it to be shared amongst his other children. On William's death, James took his next brother, John, into partnership; and that partnership continued until James's death. The father himself died in the year 1827, having, by his will, devised all his real and personal estate to John and Thomas and his three daughters as tenants in common. Then, as the bill states, this sort of transaction took place, namely, the father not having taken to himself the personal estate of William, it was treated by William's brothers and sisters as if it belonged to them; and, for the purpose of ascertaining what was the amount of the personal estate, a valuation was made of William's share in the partnership estate and effects, that is to say, a valuation was made of all the partnership estate and effects, and one moiety of the valuation-money was allotted as the share of William. In making that valuation, a sum of 600*l.* was inserted for the purpose of representing the beneficial value of the tenement in question; and an account was produced, at the hearing, which certainly shows that a sum of 600*l.* was inserted, as the value of the tenement, in the account of the various things which, together, composed the partnership property. The whole amount came to 3,000*l.*; and, therefore, the share of each of the brothers and sisters was taken at 500*l.* Upon the footing of that account, John paid, to his brother Thomas, and his three sisters, the sum of 500*l.* each, as their shares. In the progress of the settlement of the affairs of the sons mixed together with the affairs of the father, John and James, who carried on *the [*504] business in partnership together, out of their partnership funds paid off the amount of the mortgage, in this way, namely, as the father had given his real and personal estate to John and Thomas and his three daughters, and the sum which was due on the mortgage was 800*l.*, the sum of 640*l.*, which is four-fifths of 800*l.*, was paid to Thomas and his three sisters in respect of their shares of the money due on the mortgage; and John retained to himself the remaining one-fifth. In pursuance of that transaction, by indentures dated the 13th and 14th of May, 1831, the legal estate in the four-fifths which were vested in Thomas and his three sisters, was conveyed to James and John as joint ten-

ants in fee. That is the conveyance in which, as the bill alleges, James did not acquiesce.

A great deal of evidence was entered into to support the defendant's case: many exhibits were produced; and as it was impossible for me, at the time, to go through the whole of them, I took some time to read them over in order to see what they amounted to; and the conclusion which I have come to, is that the land was purchased, by William and James, with money which they had borrowed, from their father, for the purpose of making the purchase.(a) It is quite plain, however, from the evidence, that the land was treated, in some sense, as partnership property: payments were made, to the father, under the name of rent, but obviously on account of interest; and a variety of improvements were made on the property at the expense of the partnership; and there was evidence to show that that sum of 600*l.*, which was inserted in the valuation that was made [*505] of the partnership property, in order to ascertain *what William's share amounted to, was inserted with reference to improvements on the land which cost that sum, and which therefore might very fairly be considered as the value of the property, when it is considered that the property itself was mortgaged for the whole amount of the original purchase-money.

In my opinion, however, it is not at all a material circumstance to ascertain that the sum mentioned in the valuation as being the value, was really the full value. It appears that some of the parties disputed the accuracy of the valuation; and there is complete evidence that Thomas Houghton was dissatisfied and did not think that the account was made out large enough; but the material fact is this, namely, that, for the purpose of dividing the personal estate of William, the value of that property which was in its nature real, was included; and that, John acting upon the supposition that, by means of payments according to the account, he should acquire the personal property of William, (at least all the shares which his brother Thomas and his sisters had,)

(a) The defendants admitted, in their answers, that the 800*l.* was borrowed from James Houghton the father.

did make payments to them out of his own money. It is also proved that James knew what was going forward, and that that sum which was actually paid and appears to have been the amount of the purchase-money, minus John's share of it, was paid by a cheque on the partnership, or, in other words, out of the partnership assets; so that James who, at that time, was carrying on the business in partnership with his brother John, did allow a portion of the partnership assets to be applied for the purpose of paying off the mortgage.

Now I confess that I do not think this case stands on the proposition which was stated so very *plainly and broadly by Sir John Leach in the case of *Phillips* v. *Phillips:* but the question before me is this, whether I have not sufficient evidence of the dealings between James and John with regard to this real estate (in which, as real estate, James then had the sole interest) to show that James consented, as regarded John, that it should be treated as partnership property: and my opinion is that the evidence does amount to that. [*506]

I have this further observation to make, namely, that, by the mode of conveyance which, it appears, was adopted, in May, 1831, in consequence of directions given by James as well as John, the legal estate in four-fifths of the property, was conveyed to James and John as joint tenants; so that this effect was produced at all events, namely, that independent of any question of equity, four-fifths of the whole property in question belonged to John. The dispute, therefore, in this Court is, in reality, about the remaining one-fifth only; and, with respect to that one-fifth, my opinion is that there are circumstances which make it imperative upon the Court to declare that, as between James and the plaintiff who represents him as his heir, and John, the estate is to be considered as personal estate.

My opinion further is that this bill has been filed in utter ignorance of the truth of the case. The allegation, in the bill, that James never acquiesced in the indentures of May, 1831, turns out to be utterly groundless. If that allegation had been proved, still, if the effect of that conveyance had been fully considered and those facts ascertained, which they might have been

by applying either to Thomas Houghton or to the attorney who acted for all parties in their transactions amongst themselves, it would have appeared that, with respect to a large [*507] *portion of the estate, no claim could be supported.

My opinion, therefore, is that I must dismiss the bill with costs.

ARCHER *v.* SLATER.

The probate of a will is not a sufficient authentication of it, so far as it relates to copy-holds.

IN the course of the argument in this case (reported ante, Vol. X. p. 624,) the Vice-Chancellor said that he knew of no case in which the Court had established a will relating to copyholds; and that he had always understood that if a copyholder surrendered his tenements to the use of his will, and then made an instrument which the Ecclesiastical Court, on his death, admitted to probate, the probate copy was sufficient to guide the uses of the surrender.

Lord Eldon, however, in *Jervoise* v. *The Duke of Northumberland*,(*a*) said: "This being a devise of copyhold estates, if it is a good will of personal estate, it will be a good will of copyhold estates. I do not know whether it has been proved as this Court requires; but it is admitted. I say so, because I do not take it, according to the old course of the Court, that the fact of the probate of a will in the Ecclesiastical Court, was evidence that copyhold estates would pass by it: but here the heir at law(*b*) admits it.

(*a*) 1 Jac. & Walk. 570. See Phill. on Evidence, tit. Probate.

(*b*) The copyholds were descendible according to the course of descent at common law.

Wills relating to personal estate must be now executed in the same manner as wills relating to real estate. But, it is apprehended, that the Courts of Law and Equity will not admit the probate copy as evidence of a devise.

*Bankes *v.* The Baroness Le Despencer, an Infant, [*508] and others.

1843: 14th, 24th, and 25th January, and 13th February.

Estates settled so as to go along with a barony in fee.

Form of settlement approved of by the Court, in pursuance of a direction contained in a deed executed by the late Lord Le Despencer that his estates should, so far as the law would allow, be strictly settled, after his death, so as to go along with the baronial dignity of Le Despencer (which was a barony in fee,) and be held and enjoyed by the person for the time being possessed of the same dignity, for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of the late Lord, but with a provision that in case the dignity should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned.

By the order made at the hearing of this cause for further directions, on the 10th of March, 1840, (see ante, Vol. X. p. 576,) it was referred, to the Master, to approve of a proper settlement to be made of the manors, estates, hereditaments and premises comprised in the indentures of the 7th and 8th days of August, 1826, upon the uses and trusts and according to the directions expressed, concerning the same, in and by the indenture of the 8th of August, 1826: and the Master was to state the same to the Court.

On the 6th of July, 1842, the Master reported that, the draft of a settlement having been laid before him on behalf of the plaintiff, he had perused and settled and did approve of the same as a proper settlement to be made of the manors, estates, &c., comprised in the indentures upon the uses, &c., before mentioned; such settlement being by indenture intended to be made between the plaintiff William John Bankes, of the first part, the defendant, The Baroness Le Despencer, of the second *part, the Earl of Falmouth, George Bankes, Esq., and [*509] Lord James O'Bryen of the third part. The Master

further reported that it had been submitted to him, on behalf of the defendants, Adelaide Stapleton, Anne Byam Stapleton, Jane Eliza Stapleton and Maria Catherine Stapleton, infants, (the daughters and only issue of Miles John Stapleton, deceased, the late Lord Le Despencer's third son,) by Lord James O'Bryen their guardian, that the draft settlement should contain *clauses for the appointment of a protector or protectors of the settlement* during the lives of the respective persons who were to have life estates, pursuant to and according to the terms of the 32d section of the statute 3 & 4 Will. 4, c. 74, (for the abolition of fines and recoveries, &c.;) and also *that a term of years determinable with such lives and the expiration of* 21 *years from the death of the survivor of such tenants for life, should be limited, and trusts declared to effect the purposes directed with respect to the rents and profits during suspension or abeyance of the baronial dignity of Le Despencer, instead of the shifting proviso inserted in the draft indenture.* But he was of opinion that, regard being had to the draft as prepared, the same was unnecessary. And it having been submitted to him, on the part of the last-named defendants, that, after the conveyance by the plaintiff, William John Bankes, as the surviving trustee of the indenture of the 8th day of August, 1826, to the trustees proposed to be appointed by the draft-deed, of all the estates comprised in the indenture of the 8th day of August, 1826, the words following, that is to say: "and all other hereditaments which are liable to the trust for settlement contained in the said last-mentioned indenture of release," ought to be inserted; and also that a clause ought to be inserted giving the Court of Chancery power to alter, vary and explain the limitations of the
[*510] proposed deed of *settlement: and such additions being assented to by the plaintiff and by the defendant the Baroness Le Despencer, he had inserted such additions in the draft: but, such additions being objected to on the part of the defendant, Sir Francis Jarvis Stapleton, (the late Lord's youngest and only surviving son,) he was of opinion that it would be more accurate, in point of form, to omit the first of the beforementioned additions; and, with respect to the second of such additions, he was of opinion that such a clause as that proposed,

might be found useful; but it was alleged by the defendant, Sir F. J. Stapleton, that the insertion of such a clause was not warranted by the order of the 10th of March, 1840.

The draft approved of by the Master, purported to be a conveyance by the plaintiff to the Earl of Falmouth, George Bankes, and Lord James O'Bryen, their heirs and assigns, of all the manors or lordships, capital messuage or castle, and other messuages, park, farm, lands, meadows, coppices, woods, and woodgrounds, cottages, buildings and other hereditaments in the indentures of the 7th and 8th of August, 1826, mentioned and referred to, and thereby conveyed or expressed so to be, together with their rights, royalties, &c.; and all other hereditaments which were liable to the trust for settlement contained in the last-mentioned indenture; to the use of the Baroness Le Despencer for her life, without impeachment of waste, to the use of trustees, during her life, in trust to preserve, &c., to the use of her first and other sons, successively, in tail, to the use of her daughters, equally, as tenants in common in tail, with cross limitations between or among them in tail, and, if she should have only one daughter. to the use of that only daughter in tail: to the use, as to one-fourth part of the manors, &c., of Adelaide Stapleton, *for her life, without impeachment [*511] of waste, to the use of the trustees, during her life, in trust to preserve, &c., to the use of her sons and daughters for the same estates as were expressed to be given to the Baroness's sons and daughters respectively; and, as to two other fourth parts, to uses in favor of Anne Byam Stapleton and Jane Eliza Stapleton, and their sons and daughters, similar to the uses in favor of Adelaide Stapleton and her sons and daughters respectively; and, as to the remaining fourth part, to the use of Maria Catherine Stapleton in tail.(*a*) The draft then provided that, in case of the failure or determination of the uses thereinbefore declared as to the shares of any of the four last-mentioned young ladies, their shares, as well original as surviving or accruing, should go to the three others of them and their issue, for the

(*a*) This young lady was born after the late Lord Le Despencer's death.

same estates, &c., as were thereinbefore limited with respect to their original shares; and it declared uses, of the entirety of the manors, &c., after the failure or determination of all the uses thereinbefore limited, in favor of Sir Francis Jarvis Stapleton, and his sons and daughters, similar to those in favor of the Baroness Le Despencer and her sons and daughters, respectively.(a)

At the end of the limitations, the shifting proviso was inserted. It was as follows:

"Provided, always and it is hereby declared and agreed
[*512] that, notwithstanding, some of the limitations *hereinbefore contained, are made to several persons as tenants in common or applicable to undivided parts or shares of and in the said manors and hereditaments hereby settled, the object and intent of the settlement hereby made, is to limit the entirety of the same manors and hereditaments, as far as the law will permit, so as to accompany the dignity of Le Despencer, as long as the person possessed of the same dignity shall be a lineal descendant of the said Thomas Lord Le Despencer, in pursuance of the direction in that behalf contained in the said recited indenture of appointment and release of the 8th day of August 1826; and the said limitations to tenants in common or applicable to undivided parts or shares are made upon the assumption that, at the respectives times at which the same are limited to take effect in possession, the said dignity will be in abeyance; and, therefore, in order the better to effect the said object and intent of this settlement, it is hereby further declared and agreed, that in case, (but only during the lives of the several descendants of the said Thomas late Lord Le Despencer to whom estates for their lives respectively, are hereinbefore limited and the life of the longest liver of the same and the term of 21 years to be computed from the day next before the day of the decease of such longest liver,) at the time or respective times at which the said manors and hereditaments hereby settled shall, under the limitations of these presents, become vested in possession in any two or more of such

(a) There were several other lineal descendants of the late Lord Le Despencer, and the draft contained limitations in their favor: but, for the purposes of this report, it was not necessary to state them.

lineal descendants in undivided shares, the said dignity shall not be in abeyance, or in case, at any time or times during the limited period hereinbefore mentioned and while after the said manors and hereditaments shall have so become vested in possession in undivided shares as aforesaid, the said dignity shall be in abeyance and such abeyance shall be determined, *by [*513] the prerogative of the Crown or otherwise, in favor of any one person being a lineal descendant of the said Thomas late Lord Le Despencer, then and in either of the said cases and so often as the same shall happen during the limited period aforesaid, the several uses and limitations hereinbefore limited and contained shall cease and determine, and the entirety of the said manors and hereditaments with their appurtenances shall, thereupon, become vested in the person in whom the said barony or dignity shall become vested by the determination of such abeyance in her or his favor or otherwise, for such and the like estate in possession, and with such and the like remainders and limitations over as the same manors and other hereditaments or any part or share thereof, are or is limited and assured to or would have become vested in her or him, under and by virtue of the limitations hereinbefore contained: and, if the case provided for as aforesaid, shall, during the period aforesaid, happen more than once, then this provision shall be applicable and operate *toties quoties*."

Then followed the clause which was referred to, in the Master's report, as the clause giving the Court of Chancery power to alter, vary and explain the limitations of the proposed deed of settlement. It was thus expressed:

"Provided always that, notwithstanding the uses, trusts, powers, and limitations hereinbefore contained, and in order and to the intent that such uses, trusts, powers and limitations as are hereinbefore contained may, under the authority and by the direction of Her Majesty's High Court of Chancery, be altered, varied, explained, enlarged or revoked in such manner and to such extent as the said Court shall decree or order in *case the same Court shall, upon or according to the [*514] true construction of the said recited trust or direction

for settlement of the said trust estates, think proper or deem it expedient to decree or order any such alteration, variation, explanation, enlargement or revocation, it is hereby agreed and declared, between and by the said parties hereto, that it shall be lawful for the trustees or trustee, at any time or times hereafter during the life of the survivor of the persons hereby made tenants for life or within 21 years next after his or her death, and under the authority and by the direction of and in obedience to any decree or order of the said Court of Chancery (but not otherwise) by any deed or deeds, instrument or instruments in writing to be sealed and delivered by the same trustees or trustee in the presence of and attested by two or more credible witnesses, to alter, vary, explain, enlarge or revoke all or any of the uses, estates, trusts powers and limitations hereinbefore limited, created, expressed, declared and contained of and concerning the said manors, hereditaments and premises hereinbefore expressed, to be hereby released or any of them, and, by the same or any other deed or deeds, instrument or instruments in writing to be sealed and delivered and attested as aforesaid, to limit, declare, direct or appoint such new or other use or uses, estate or estates, trusts and powers as shall be decreed or ordered by the said Court of Chancery to be limited, declared, directed or appointed."

The cause was now brought on to be heard for further directions. Exceptions were not taken to the Master's report, as it stated the grounds on which the draft of the settlement was objected to.

Mr. *Follett* appeared for the plaintiff.

[*515] *Mr. *Anderdon* and Mr. *Lee*, for the Misses Stapleton, the daughters of the late Miles John Stapleton: The mode of settlement which the Master has approved of, is subject to this observation, namely, that all the limitations may be speedily defeated: for, as soon as the Baroness has a son who shall attain 21, her husband may prevail on her and her son to join in putting an end to the limitations. The estates ought to

be settled so as to put it out of the Baroness's power to defeat the limitations. Before the passing of the late Act for abolishing fines and recoveries, that object might have been effected by limiting the estates, to the Baroness for a term of years determinable on her death, and giving the first estate of freehold to trustees. That course was suggested by Sir A. Hart, V. C. in *Woolmore* v. *Burrows*.(a) There a testator directed the residue of his fortune to be laid out in land as contiguous as practicable to Stradone in the county of Cavan, Ireland, to be added and closely entailed to the family estate then in the possession of his relative Thomas Burrows. It appeared that the estate to which the testator alluded, was settled on Thomas Burrows for life, with remainder to his first and other sons in tail male: and, part of the testator's residuary estate having been laid out in the purchase of lands, it was referred to the Master, to approve of a proper settlement of them, upon the uses and trusts and according to the directions of the will. The Master approved of a settlement by which the purchased estates were limited to Thomas Burrows for life, with remainder to trustees to preserve, &c., with remainder to Robert, the son of Thomas (who was born in the testator's lifetime,) for life, with remainder
*to trustees to preserve &c., with remainder to his first [*516]
and other sons in tail male. Some of the parties excepted to the report; and after the exceptions had been argued, Sir A. Hart said: "I do not think the limitations imposed by the Master on Thomas and his issue, are more strict than they ought to be: and there is one point in which I think the Master ought to have fettered the power of Thomas to alienate the testator's estate more than he has done. As the limitations stand, Thomas, having the estate of freehold in possession, by joining with any tenant in tail, may bar the remainders and alien the estate; which would be obviously inconsistent with the general intent of the testator. If the Master had limited the first estate of freehold to trustees and their heirs, during the life of Thomas, in trust for him (a course now frequently adopted in family set-

(a) Ante, Vol. I. p. 512.

tlements,) Thomas would be disabled by any act during his life, to alien the estate; and so far as the testator's estate would remain closely entailed. Such a limitation would effectuate the clear intention of the testator, of preventing an alienation of his own estate, which must be implied to have been as much his object as preventing an alienation of the Stradone estate. I, therefore, think the limitations in favor of Thomas should be varied, by vesting the first estate of freehold in trustees during his life in trust for him, without impeachment of waste; and the other limitations are proper." We are, therefore, sanctioned by Sir A. Hart, when we urge the Court to provide against the consequences, which, as we have pointed out, are likely to follow from adopting the mode of settlement which has been approved of by the Master. The plan, however, of making the first taker under the settlement tenant for a term of years determinable on his or her decease, would not, as the law now stands, have
[*517] *the desired effect: for, the 22d section of the Act for abolishing fines and recoveries makes the termor the protector of the settlement: so that it vests the protectorship in a person whose interest it is not to preserve the limitations of the settlement. But the 32d section of the Act contains a provision by which the object of that plan may be still attained. That section empowers the settlor to appoint any number of persons, not exceeding three, to be protector of the settlement in lieu of the person who, but for that section, would have been the protector, and, either for the whole or any part of the period for which such person would have continued protector; and, by means of a power to be inserted in the settlement, to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons *in esse*, whom the donee of the power shall think proper to appoint protector in the place of any one person or number of persons who shall die or shall relinquish his or their office of protector: provided that the number of persons composing the protector, never exceed three. This provision is in lieu of doing that which Sir A. Hart, in the case referred to, says ought to have been done and which the Act has rendered impracticable or, at least, inef-

fectual. Mr. Fearne, in his essay on contingent remainders, (page 117, 6th edit.) says: "In the last cited case, that of the *Earl of Stamford* v. *Sir John Hobart*,(a) was resorted to, in order to show that the Court was not tied up to the rules of law in cases of executory trusts: and, though such case does not rank as one of those in which the Court of Chancery has deviated from the rule in Shelley's case, because the limitation to the heirs male of the body, there, was preceded only by a term of years and not by a life estate in the ancestor; yet it *is [*518] one of the cases in which the Court has executed a trust for heirs male, in a course of strict settlement on first and other sons successively in tail male. At the same time it is a strong and leading authority for the corrective interposition of equity in modelling the limitations of executory trusts in wills, no less than in marriage articles, in such a manner as to substantiate the apparent intention." The case alluded to by Mr. Fearne was as follows: A testator devised his estates, in remainder after his wife's decease, to trustees, and directed them, after his wife's decease, to convey his estates to the use of his granddaughter and her husband, for their lives and the life of the survivor of them; remainder to her first son for 99 years if he should so long live; remainder to the heirs male of the body of such first son; remainder to every other son of his granddaughter, for 99 years, if every such son should so long live; remainder to the heirs male of every of them, successively; each son to take for 99 years with immediate remainder to his heirs male. At the testator's death, his granddaughter had no issue male. Afterwards an Act of Parliament was obtained, which enacted that the estates should go unto and be held and enjoyed by such person and persons, and for such estates and interests, as in the will expressed: and the trustees were empowered to convey the estates, immediately, unto such person and persons, and for such estate and estates as the same were, by the will, limited and appointed to be conveyed, as if the testator's widow were dead. After the decease of the granddaughter and her husband, upon a

(a) 1 Bro. P. C. 388.

bill filed by their only son, the trustees were directed to convey the lands according to the will and the words of the Act of Parliament. And a draft of conveyance being accordingly settled by the Master to trustees and their heirs, to the uses in the will and Act of Parliament expressed, the plaintiff excepted to it, for [*519] *that the premises ought, at least, to have been limited to the use of the trustees and their heirs, and only in trust for such person and persons, and such estate and estates as were by the will and act of Parliament limited; whereby the legal estate might be vested in the trustees for the better preservation of the contingent limitations, which, otherwise, as the draft was prepared, were liable to be destroyed and the testator's intention defeated. Upon hearing the exception, Lord Chancellor Cowper declared that, in matters executory, as in cases of articles or a will directing a conveyance, where the words of the articles or will were improper or informal, the Court would not direct a conveyance according to such improper or informal expressions; but would order the conveyance to be made in a proper and legal manner, so as might best answer the intent of the parties; and, in that case, his lordship conceived the true intent of the will to be that the estates should be secured, as far as the rules of law would admit, to the issue male of the devisee, and that it was designed to be as strict a settlement as possible by law. His lordship, therefore, decreed that, in the conveyance, where the estates were limited in use, to the plaintiff, for 99 years, if he should so long live, there should be a limitation over to trustees and their heirs, during his life, to preserve the contingent uses in remainder, and then to the first and other sons of the plaintiff in tail male successively. Upon an appeal to the Lords from the last decree, it was contended that the act of Parliament, which was so very express in confirming the estates appointed by the will, could never intend that a court of equity should have power to direct a conveyance to other uses than were mentioned in the will; but the decree complained of did so, and was, therefore, repugnant both to the will and [*520] to the act of Parliament, as well as to the *former decree. To this it was answered that, in cases of execu-

tory articles for the settling of estates, it was usual for courts of equity to help informalities and supply defects; especially when the things supplied were necessary to support the main intent of the parties and to carry such articles into execution according to that intent, so far as it might agree with law, though not strictly according to the words of the articles; and, *a fortiori*, would courts of equity do so in the case of a will, where the same was only executory by a conveyance to be made: that the act of Parliament made no alteration in the will in the point in question: it only hastened the time for the trustees to convey, even in the lifetime of the testator's widow; but, in all other respects, it confirmed the will, and being strictly relative to it, the intent of the will ought to be the rule of the conveyance. The decree was, accordingly, affirmed by the Lords.

We now come to the second point in this case. It arises on the trust or direction, contained in the indenture of the 8th of August, 1826, that, in the settlement thereby directed to be made, there should be inserted a provision that, in case the dignity of Le Despencer should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents of the estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively by reason of whose death or deaths, such suspension or abeyance should be for the time being occasioned. At the former hearing of this cause, that trust was attacked as tending to a perpetuity; and it was said that it was impossible to carry it into execution. Your Honor, however, was of a differ-
ent *opinion; and, in answer to the objections, thus ex- [*521]
pressed yourself: "Suppose, that the settlement were to be made in this form: namely, that the estates were to be limited to trustees for a term of 1,000 years, determinable at the end of 21 years from the death of the survivor of all the persons *in esse* at the time of the late Lord Le Despencer's death, and then capable of succeeding to the dignity, and that, subject thereto, the estates were then limited to the different persons so *in esse* and capable of succeeding to the dignity, for their lives, succes-

sively, with remainder to their sons in tail, with remainder to their daughters in tail; and that then the trusts of the term of 1,000 years were declared to be that, in the event of there being any abeyance such as is here contemplated, the rents should, during the time, (which could not exceed the limits fixed by law,) be disposed of in the manner prescribed: there can be no doubt that that would be a legal mode of settlement. I do not say that that is the only or the best method of executing the trust: but it is one mode which appears to me to be unobjectionable in point of law. And, when you find that the intention of the parties is to do that only which the rules of law will permit, or, as it is expressed, which may be done within the limits prescribed by law for strict settlements, my firm opinion is, that it is the duty of the Court to refer it to the Master to approve of a proper settlement according to the language of the trust." A plan similar to that which your Honor suggested, was upheld and carried into execution, by Lord Nottingham, C., in the Duke of Norfolk's case:(*a*) and, with reference to the Master, we think that the draft would have been more consonant to the intention of the parties to
[*522] the deeds of 1826, if your Honor's suggestion had been adopted. According to that suggestion, the clause providing for the suspension or abeyance of the dignity, would have been inserted immediately after the limitation to the Baroness for her life; and then it would have been safe from the power of the tenant in tail. But the clause, which is called the shifting proviso in the report and which has been inserted, in the draft, in lieu of that which your Honor suggested, is placed after all the limitations; and, consequently, it will be in the power of the first tenant in tail to bar it. The case of *Eales* v. *Conn*,(*b*) shows that a term for raising a sum of money within proper limits, may be so placed as that it shall not be in the power of the tenant in tail to destroy it. In *Doe* v. *Lord Scarborough*,(*c*) the Court of King's Bench thought that the power of the tenant in tail was curbed by something that appeared in the settlement: but the Court of Error held that recovery did destroy the shifting clause. The

(*a*) 3 Ch. Ca. 1. (*b*) Ante, Vol. IV. p. 65. (*c*) 3 Adol. & Ell. 2.

present case is distinguishable from *Lord Southampton* v. *The Marquis of Hertford*,(a) *Phipps* v. *Kelynge*,(b) and *Marshall* v. *Holloway*:(c) for, in those cases cases there was no limitation to the operation of the trusts.

There are two other matters noticed in the report; but they are not of so great importance as those which we have already discussed. One of them is the insertion of the words: "and all other hereditaments which are liable to the trust for settlement, &c," at the end of the parcels. Those words have been properly introduced in order to comprehend any lands that may have *been received in exchange or allotted, under inclosure Acts, for or in respect of lands comprised in the deeds of August, 1826. [*523]

The last matter to be discussed, is the proviso in the draft, which gives the trustees, under the direction of the Court of Chancery, power to alter or revoke the limitations of the settlement. Suppose that a settlement should be executed under your Honor's decree, the legal estate would be gone; and, if any of the parties, being dissatisfied with the decree, should appeal from it, and the Court should think that the settlement ought to be altered, the legal estate could not be called back. But, if the proviso in question is allowed to be inserted in the settlement, the Court will have it in its power to order the legal estate to be called back, and the estates to be settled according to the final decision of the Court.—[THE VICE-CHANCELLOR: Is there any instance of a settlement being prepared under the direction of the Court, with such a clause as this in it?]—That eminent conveyancer, the late Mr. Sanders, prepared such a settlement.

Mr. *Bethell* and Mr. *Hetherington*, for Sir Francis Jarvis Stapleton, the youngest and only surviving son of the late Lord Le Despencer.

If a settlement is to be made pursuant to the draft which the Master has approved of, the intention of the late Lord Le Despencer and his son, as expressed in the release of August, 1826,

(a) 2 V. & B. 54. (b) 2 V. & B. 57, n. (c) 2 Swanst. 432.

will not be carried into effect; for the estates will not be strictly settled, so far as the law will permit, so as to go along with the dignity of Le Despencer, so long as the person possessed of the dignity shall be a lineal descendant of the late lord. His [*524] object evidently was that the estates should be *rendered inalienable as long as the law would allow: but that object will not be attained if the Court adopts the draft. Why was not the plan of creating, in the first instance, a term for years determinable at the end of twenty-one years after the death of the survivor of all the lineal descendants of the late lord who were *in esse* at his death (which was suggested, by your Honor, at the former hearing) followed by the Master?

Secondly: The draft, in several parts of it, affords grounds for future doubt and litigation. Why are the following words introduced into the abeyance clause: "The object and intent of the settlement hereby made, is to limit the entirety of the same manors, &c., as far as the law will permit, so as to accompany the dignity of Le Despencer, &c." Those words throw the parties back to the position in which they were under the deeds of August, 1826. The Court ought to be in a condition to declare that what is here stated to be the object and intent of the settlement, has been done.

Thirdly: The power of revocation and new appointment given to the trustees, under the direction of the Court, is calculated to create uncertainty as to what has been done. If it has been rightly done, it ought to be final: if it has not been rightly done, the power in question, is unnecessary.

Fourthly: The general words inserted at the end of the parcels, introduce another element of doubt and uncertainty. It ought to be ascertained whether there are any other hereditaments which are liable to the trust for settlement, if there be any doubt upon that head. But it has never been suggested even that there are any such other hereditaments. The [*525] decree too directs the *Master to approve of a proper settlement of the manors, &c., comprised in the indentures of August, 1826; and the language of the decree ought not to be departed from.—[THE VICE-CHANCELLOR: The word "com-

prised" means, "impressed with the trust for settlement." It must be the object of all parties to have all the hereditaments included, which were intended to be comprised in the settlement.]

Mr. *Stuart* and Mr. *Hodgson* for the Baroness Le Despencer: The draft which the Master has settled, is perfectly unobjectionable in every particular. It has been said that some person or persons ought to be appointed to protect the limitations of the settlement. But the Act abolishing fines and recoveries, says that the settlor is to appoint the protector; consequently the Court cannot make the appointment. The late Lord and his eldest son could not mean that a protector should be appointed, for there was no such office known to the law when the deeds of August, 1826 were executed.—[THE VICE-CHANCELLOR: The words of the release are: "so far as the law will permit": and, therefore, if the law had allowed, after that deed was executed, a more strict mode of settlement than it permitted when that deed was made, that form of settlement might be now adopted.]—The words, "strict settlement," mean nothing more than limitation to a person *in esse*, for life, with remainder to his first and other sons in tail. In *Lord Dorchester* v. *The Earl of Effingham*,(a) Guy, Lord Dorchester, by his will, directed all his landed estates to be attached to his title as closely as possible; and the conclusion *that Sir W. Grant, M. R. [*526] came to upon that direction, was that all persons in the line of the peerage who were *in esse* at the testator's death, ought to be tenants for life, and that all who were not then living, ought to be tenants in tail. That model was followed by the counsel who prepared the draft now under consideration. With reference to the objection that a term for years ought to have been limited, it is to be observed that the direction to settle the estates in this case, is, entire; it applies to the whole inheritance. What right has the Court to give, to any of the lineal descendants of the late Lord, an estate of a different quality from that

(a) 3 Beav. 180, note; and ante, Vol. X. p. 587, note.

which it gives to the other lineal descendants? A perpetual line of descent can not be effected otherwise than by creating an estate tail; and though that estate may be barred, when the tenant in tail comes of age; yet the property may be resettled and the tenant in tail made tenant for life. There is the objection to making the first taker tenant for a term of years instead of for life: the term might be sold under a *fi. fa.* whereas, under an *elegit*, the debt might be soon paid and the estate preserved.

The protector is an irresponsible person; and it is not the habit of the Court to appoint irresponsible persons. The settlor may do it; but it is a very different thing for the Court to do it.

The words in the abeyance clause, which the counsel for Sir F. J. Stapleton have objected to, were inserted because they are contained in the release of August, 1826.

It was said, on behalf of the same party, that it was the late Lord's intention that the estates should be rendered [*527] inalienable as long as the law would allow; *but the of August, 1826, says nothing to that effect.

The revocation clause ought not be allowed to remain. The settlement must be made once for all, and must then become the release absolute law governing the estates comprised in it.

Mr. *Follett*, in reply, said that the plaintiff was perfectly satisfied with the draft; and did not wish to have a protector of the settlement appointed.

13*th February.*—THE VICE-CHANCELLOR:—Upon the first question raised by the report, I am of opinion that there ought not to be any protector of the settlement under the 32d sect. of 3 & 4 Will. 4, ch. 74.

In the first place, it was stated to me, at the hearing on further directions, that the plaintiff who, under the deeds of the 7th and 8th of August 1826, is the trustee upon trust to settle, does not desire to appoint a protector. By being the trustee upon trust to settle, I think he is a settlor within the meaning of that section; and, though he is to settle in such manner as this Court

shall direct, yet, unless there is good reason to the contrary, the court ought to let him exercise his discretion. In the next place, the Act of Parliament itself furnishes reasons why a protector should not be appointed by the Court, unless upon a special case. By the 36th section, a protector is made irresponsible, and is at liberty to act from mere caprice, ill will or any bad motive. By the 37th section, a protector is enabled to take a bribe for giving consent: and, if two or three persons are *made [*528] protector, and any one of them incurs a disability under the 33rd section, then it is questionable at least whether this Court could act in lieu of such person with the other or others who are not disabled; and, if it could not, there would be no protector capable of acting. I can easily concive that a case might exist in which it might be advisable to appoint a protector according to the power given by the Act of Parliament. But, in the present case, no special circumstances are stated: and it is reasonable to presume that the members of the noble family who will successively enjoy the settled estate, will best understand their own interests; and I think it better to commit the protection of the estate to them, than to strangers who will have the statutory privilege of being uncontrollably perverse and corrupt, with the chance of rendering the protectorate, by crime or accident, utterly inefficient.

Upon the sceond question, I think it is not necessary to have a term of years limited: but that the clause in the nature of a limitation of cross remainders,(a) sufficiently answers the intended purpose.

Upon the third question, I think that the general words should stand: for they may do good and cannot do harm.

And, upon the last question, I think that the proposed clause ought to be omitted: for it is not warranted by the decree, which meant that the settlement should be final: and I think such a clause is wholly unusual and without precedent.

(a) This clause was termed "the shifting proviso," in the Master's report.

[*529] THE ATTORNEY-GENERAL *v.* NETHERCOTE.

1841: 25th January.

Under 1 & 2 Vict. c. 110, s. 17 & 18, interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate.

THIS was a suit relating to a charity. By the decree, the costs of one of the defendants were ordered to be taxed and paid out of the charity estate.

It being probable that some time would elapse before the means of paying the costs could be obtained:

Mr. *Knight Bruce*, for the defendant, asked that it might be directed, by the decree, that the amount of the costs when taxed, should be paid with interest at four per cent. from the date of the Master's certificate until the time of payment. He said that, under the 1st & 2d Vict. c. 110, s. 17, judgment debts carried interest at four per cent. from the times when they were entered up; and that the 18th section enacted: "That all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein
[*530] depending, and by the Lord Chancellor *and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors, are, in like manner, given to persons to

whom any moneys, or costs, charges or expenses are, by such orders or rules respectively, directed to be paid."

THE VICE-CHANCELLOR said that the section of the Act referred to, seemed to him to relate to those cases in which one party was directed to pay costs to another party, and not to cases in which costs were directed to be paid out of an estate.

BEDWIN *v.* ASPREY.

1841: 28th January.

The Court will not remove a next friend, merely because he is nearly related to or connected with the defendant; but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain.

THE bill was filed on behalf of an infant, who was an orphan, for the purpose of having the rights and interests of the infant and of his sister, the defendant Sarah, the wife of the defendant Edward Clowser, under a will, ascertained and declared by the Court. The defendant Asprey was the husband of the infant's aunt; and he and the defendants Grace and Weller had been in receipt of the rents of the estates in question in the cause; and an account was prayed against them accordingly.

Those three defendants moved that George Clowser, the infant's next friend, might be removed, and that it might be referred to the Master to appoint a new next friend.

The substance of the affidavit in support of the motion, was that the interests of the infant and his sister *were [*531] adverse to each other; that the next friend was the father of her husband; that the solicitor of the next friend was also the solicitor of the sister and her husband; that the infant, who was 17 years of age, had written a letter to Asprey (which was set forth) strongly disapproving of the suit being conducted by the next friend.

1841.—Bedwin v. Asprey.

An affidavit in opposition to the motion, was made by the next friend and his son, stating that the suit had been instituted in consequence of three gentlemen at the bar, who had been consulted as to the construction of the will, having differed in opinion on the subject; that the suit had been instituted, *bona fide*, for the infant's benefit, and was intended to be prosecuted without delay; that the son and his wife had employed the next friend's solicitor, in order to save expense and because they relied on his integrity: and that the infant's interest would be in nowise prejudiced thereby.

Mr. *Knight Bruce* and Mr. *Coleridge*, in support of the motion, said that the infant and his sister had interests adverse to each other; that the next friend was the father of the sister's husband; and it was natural that his feelings should be in favor of his son; that it would be in the solicitor's power to injure, materially, the infant's interest by making an imperfect statement of his case to his counsel; and that Asprey, who was the infant's nearest relation except his sister, disapproved of the suit being conducted by the next friend. *Peyton* v. *Bond*.(a)

Mr. *Jacob*, Mr. *G. Richards*, Mr. *Cooke*, and Mr. *W. H. Smith*, opposed the motion. They said that the persons [*532] *by whom the motion was made, were the accounting parties in the suit; and that it was most improper that they should have any voice in the selection of the person who was to prosecute the suit against them; that the question in the cause was merely a question of construction; that no extrinsic facts were to be dealt with; and, therefore, it was not a case in which the infant could be prejudiced even if the next friend or the solicitor were to take a bias against him; that no misconduct was alleged against the next friend; that, in *Peyton* v. *Bond*, the question was not a mere question of construction, and, in that case, the interests of the father and of his daughters were completely adverse to each other; the next friend was the

(a) Ante, Vol. I. p. 390.

father's brother; and had taken upon himself the office at the father's request, and he, as well as his solicitor (who was the father's solicitor also,) had been witnesses for the father in his suit in the Ecclesiastical Court.

THE VICE-CHANCELLOR:—In *Peyton* v. *Bond*, Sir A. Hart, V. C., says: "The Court will watch, with great jealousy, a solicitor who takes upon himself a double responsibility; and, if it sees a chance of his miscarrying, will take care, where the plaintiffs are infants, that he shall not be permitted to stand in that relation to an adverse defendant under circumstances of very adverse interest." I can not but suppose that, by the word "chance," Sir A. Hart meant, not a mere possible contingency, but something like a probability. And it appears that, in *Peyton* v. *Bond*, there was strong ground for supposing that the suit would not be conducted properly, if the management of it were left to the uncle of the infants and his solicitor; both of whom had been witnesses, for the father, in his *unrighteous suit in the Ecclesiastical Court, and had [*533] supported his interest against the interest of his infant daughters. In that case, too, the application was made by a person who had no interest adverse to the interest of the infants.(a) In this case, the application is made on behalf of the defendants, Asprey, Grace and Weller, who are the three accounting parties in the suit. There are no facts in litigation between the sister and her brother, the infant. The only question in the cause is a question of construction, and that of so difficult a nature that the three eminent counsel who were consulted upon it, differed in opinion from each other; and, in consequence of that difference, the bill was filed in order to obtain the opinion of the Court upon the meaning of the will. Therefore, there cannot be the slightest danger of any facts being kept back, which, if brought forward, might influence the decision of the Court either one way or the other.

(a) The application was made by T. Nelson, who was one of the executors under Mrs. Peyton's will, and a defendant to the bill of revivor and supplement.

1841.—Ward v. Barton.

If *Peyton* v. *Bond* is to be the authority on which this case is to be decided, I must see that there is a probability that the interest of the infant will be sacrificed, or, at least, neglected, if the father of the sister's husband is permitted to remain the next friend. I do not, however, see that there is any reasonable probability that the suit will be mismanaged if it remains as it now is.

The consequence is that the motion has been misconceived, and must be refused with costs to be paid by the parties on whose behalf it has been made.

[*534] *WARD *v.* BARTON.

1841: 29th January.

If a mortgagee of leaseholds, before he files a bill of foreclosure, is under the necessity of citing the next of kin of the deceased mortgagor, before the Ecclesiastical Court, in order to compel them to take out administration to the deceased; this Court will not allow him the costs of the citation, unless he states his case for them, on his bill.

THE bill was filed, by a mortgagee of leaseholds, for a foreclosure of the mortgage.

The mortgagor being dead and no person having taken out administration to his estate, the plaintiff, before the institution of the suit, cited his next of kin, in the Ecclesiastical Court, in order to compel them to take out administration. Upon which the defendant, who was the brother of the mortgagor, took out administration.

The suit having been heard and a decree made in the usual form.

Mr. *Teed*, for the plaintiff, asked that the costs which the plaintiff had incurred in the Ecclesiastical Court, might be included in the account directed by the decree. He cited *Hunt* v. *Fownes*.(*a*)

(*a*) 9 Ves. 70.

Mr. *Cockerell*, for the defendant, said that the proceedings in the Ecclesiastical Court did not appear upon the record.

THE VICE-CHANCELLOR: In the case cited, the death of the party to whom the letters of administration were obtained, took place pending the suit: but, in this case, the death and the proceedings in the Ecclesiastical Court, took place before *the suit was commenced: consequently the plaintiff might and ought to have made his case for the costs of those proceedings, on the record. [*535]

Mr. *Teed* then asked for leave to present a petition for the costs in question: but

THE VICE-CHANCELLOR refused to grant it, adding that all that the plaintiff was entitled to, was a decree in the common form.

[*536] *GRAVES *v.* HICKS.

1841: 30th January and 2d February.

Testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another annuity to his wife, to his grandson and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and thereupon, the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were not duly attested. He then made a fourth, which was duly attested: "revoking several of the dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate of every kind; and, instead of such devise, disposition and bequest thereof, I do give all my freehold, copyhold and personal estate of every kind and wheresoever situate, unto my daughter, for her life; and after the determination of that estate, unto my grandson and his heirs in strict entail as in my will directed." He then directed that his grandson, who was an infant, should not be put in possession of his estates until he attained thirty-one; and that, in the interval, the rents should be accumulated for the benefit of his grandson and his heirs: "and, in failure of issue of my said grandson, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils, and gave another annuity to his wife; thereby, in all other respects but what was above-mentioned, ratifying and confirming his will and codicils.

Held, that the grandson took, not an estate tail, but only an estate for life in the lands.

If lands are devised in trust to be settled on A. and his heirs in strict entail, the lands ought to be settled on A. for life, and on the persons designated as his heirs, in succession.

The Court refused to order an estate charged, by a will, with an annuity, to be either mortgaged or sold for payment of the annuity, notwithstanding the rents were very inadequate to pay it, and it had become greatly in arrear; the estate being settled on A. for life, with remainders over; the annuitant being still alive, and there being no necessity for the Court to direct the estate to be either sold or mortgaged for payment of the testator's debts.

JOHN HICKS, Esq., being seized in fee of freehold and copyhold estates in Bucks and Cornwall, by his will, dated the 4th of May, 1821, gave his copyhold messuage, called Plomer Hill House, in the county of Bucks, unto and to the use of trustees

and their heirs, in trust for his wife, Susanna Jemima, for her life or widowhood or until she should cease to reside therein, and, on her death, second marriage or ceasing to reside *on the premises, he directed his trustees to stand seised [*537] thereof upon the trust after declared of the residue of his real estates: and he gave, to the same trustees, his freehold estate called Treravel in Cornwall, in trust to pay an annuity of 20*l.* for the separate use of his niece, for her life, and to dispose of the residue of the rents for the separate use of his daughter, Anna Maria Hearle, and, after the death of his daughter, but subject to the annuity of 20*l.*, he gave the estate to her children, as tenants in common in tail, with cross remainders amongst them in tail, with remainder to the uses thereinafter declared of the residue of his real estates: and he gave his manor of Bradenham in the county of Bucks, and all the residue of his real estates, to the same trustees and their heirs, to the use that his wife might, during her widowhood, receive thereout a yearly rent-charge of 300*l.* a year, by half-yearly payments, with powers of distress and entry, and, subject thereto, to the use of his son for life, with remainders to his first and other sons successively in tail male, with remainder to the intent that the testator's wife might receive, during her life or widowhood, a further annuity of 100*l.*, and that the trustees might, during the term of 99 years, if his daughter should so long live, take a like annuity of 100*l.* in trust for her separate use, with remainder to his grandson, John Graves, for his life, with remainders to the first and other sons of John Graves, successively, in tail male, with remainder to the first and other sons of his daughter, in tail male; with remainder to his own right heirs. The testator then bequeathed his money in the funds and certain other chattels, to the trustees, in trust for his wife, during her life or widowhood, and, after her death or second marriage, in trust for the person who, under his will, should, either as tenant *for life or in tail male, be in the actual possession [*538] of his residuary real estates thereinbefore devised, or entitled to the rents and profits thereof. The testator then be-

queathed certain other chattels to his wife absolutely; and gave the residue of his personal estate to his son.

The testator made five codicils to his will. By the first, which was dated the 10th of May, 1822, after reciting that, since the execution of his will, his son had died unmarried and without issue, and that, in consequence thereof and for other reasons, he was desirous of making such additions to and alterations in his will as were after mentioned, he devised his estate of Treravel, after the decease of his daughter, to the use of Francis Hearle, her husband, for his life, and, after his decease, to the uses limited by his will after the decease of his daughter: and he charged the manor of Bradenham and his other residuary real estates with the payment of a further annuity or rent-charge of 100*l.* to his wife during her life or widowhood: and he gave to her, absolutely, some of the chattels which, by his will, he had given to her for her life; and he also gave her the residue of his personal estate.

The testator, by his second codicil, dated the 15th of July, 1822, appointed his wife sole executrix and residuary legatee of his personal estate.

By his third codicil, dated the 18th of July, 1822, he gave the proceeds of five shares in the County Fire Office to his wife, for her life, and, after her death, to his daughter and her husband and the survivor of them, for their lives, and after their decease, to the testator's heir in possession of his Bradenham and other estates.

[*539] *The fourth codicil was dated 14th September, 1822, and was as follows: "I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me, in my said will and codicils, of all my freehold, copyhold, and personal estate and effects of all and every kind and description; and, instead and in the place of such devise, disposition, and bequest thereof, I do give, devise, and bequeath all and every my freehold and copyhold, and personal estate and effects of every kind and description, whatsoever and wheresoever situated, unto my daughter, Anna Maria Hearle, for her life; and, from and after

the determination of that estate, I give, devise, and bequeath the same unto my grandson, John Graves, and his heirs in strict entail, as in my said will directed; with this additional clause, especial and positive orders that, in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve unto him by the death of my daughter, he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and, in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed. And I do hereby ratify and confirm the several annuities and donations by me, in my said will and former codicils, given and bequeathed; and I do further give and bequeath unto my dear wife, Jemima, one other annuity of 100*l.*, to be paid her in like manner and with the like restrictions as the former ones given by my will and codicils; hereby, in all other respects but what is above mentioned, confirming my said will and codicils."

*The contents of the fifth codicil were wholly irrele- [*540] vant to the purposes of the present report. The will and all the codicils, except the second and third, were duly executed and attested.

The testator died in June, 1825, leaving Susanna Jemima Hicks, who was his second wife, his widow, and Ann Maria Hearle and John Graves, (who was an infant,) his only issue, his co-heirs at law, him surviving.

Several questions arose as to the construction and effect of the will and codicils. One was whether the devise in the will of the Plomer Hill House, in favor of Mrs. Hicks, was revoked by the fourth codicil. That question was tried in an action of ejectment brought, in the Court of Exchequer, by Mr. and Mrs. Hearle against Mrs. Hicks. The point was reserved at the trial, and was afterwards argued before the Barons, who gave judgment in favor of Mrs. Hearle. Mrs. Hicks brought a writ of error in the Exchequer Chamber, where the judgment of the

court below was reversed. Mr. Hearle then brought a writ of error in the House of Lords; and that House, after consulting the judges, affirmed the judgment of the Exchequer Chamber.(*a*)

In November, 1825, John Graves, who was then an infant, instituted a suit in this Court, by his next friend, against Mrs. Hicks, Mr. and Mrs. Hearle, and the trustees of the will and codicils, to have the trusts of those instruments carried into execution, and the rights of the parties under them ascertained.

The cause having been heard, and the Master having made his report in pursuance of the decree, both the plaintiff [*541] *and Mrs. Hicks excepted to the report. The exceptions were argued in December, 1833, at the same time the cause was heard for further directions.(*b*) The Vice-Chancellor then directed a case to be made for the opinion of the judges of the Court of King's Bench, upon the following question: "Whether, under the will and codicils (subject to the preceding estates for life,) John Graves took an estate for life, or an estate in tail male, or an estate in tail general, in the real estates of the testator respectively; and what estate he took in each of the estates in Buckinghamshire and Cornwall,(*c*) under the will and codicils?"

The case was argued in Michaelmas Term, 1835, before Patteson, Williams, and Colleridge, Justices; and, on the 2d of February, 1836, those learned Judges certified that they were of opinion that J. Graves took an estate for life, in each of the estates in Bucks and Cornwall, under the will and codicils.(*d*)

The cause now came on to be heard a second time, for further directions.

Mr. *Jacob* and Mr. *Koe*, for the plaintiff, John Graves:

Three of the Judges of the Court of King's Bench have cer-

(*a*) See 1 Youn. & Jer. 470; *Doe* v. *Hicks*, 8 Bing. 475.
(*b*) See ante, Vol. VI. p. 391.
(*c*) The testator had no estate in any other county.
(*d*) 5 Adol. & Ell. 38.

tified that, under the will and codicils, the plaintiff takes only an estate for life in the testator's estates. The first question is whether that certificate ought to be confirmed, or whether the case ought not to be sent to another court of law? We submit that the *certificate is erroneous, and that the [*542] learned Judges ought to have certified that the plaintiff, subject to the prior life interests, takes an estate tail in the testator's estates. The question depends upon the effect of the fourth codicil, taken in connection with the will.

The testator's son having died in the testator's lifetime, without issue, the plaintiff, under the will, would have taken a life interest in all the estates, with remainders to his first and other sons in tail male, subject, as to the Plomer Hill House, to Mrs. Hicks's interest therein, during her life, &c., and subject, as to the Treravel estate, to the interests therein of Mrs. Hearle, for her life, and of her children, (if she had had any,) as tenants in common in tail. By the first codicil, the testator interposed an estate for life, in the Treravel estate, in favor of his son-in-law, Mr. Hearle, between the estate for life of his daughter and the estate tail of her children. The second and third codicils have no bearing on the present question. Then comes the fourth codicil, by which the testator revoked and made null and void several of the dispositions theretofore made by him, in his will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description; and then, instead of such devise, disposition, and bequest thereof, he gave all and every his freehold, copyhold, and personal estate and effects, of every description whatsoever and wheresoever situated, unto his daughter for her life; and, after the determination of that estate, to the plaintiff and his heirs, in strict entail, as in his will directed. The first question that arose on that codicil, related to the extent of the revocation. The Court of Exchequer held, (as would certainly seem to be the case, at first sight,) that the revocation was entire: that is, that it extended *to all the dispositions in the will. But the Exchequer [*543] Chamber, and, afterwards, the House of Lords, were of a different opinion, and held that the revocation was partial

only, and that Mrs. Hick's interest in the Plomer Hill House was not affected by it. That being so, and the testator having, by this fourth codicil, given all his estates to Mrs Hearle for her life, the plaintiff's interest in each of the estates, whatever it may be, is postponed in enjoyment until after the death of Mrs. Hearle; and, with respect to the Plomer Hill House, until after the death of Mrs. Hicks, or her marrying again or ceasing to reside in the house. Subject to those prior interests, all the freehold, copyhold, and personal estates are given, to the plaintiff and his heirs, in strict entail, as in the will directed. Now there can be no doubt that, if the devise had been made to the plaintiff and his heirs in strict entail, he would have taken an estate in tail general; but then follow the words: "as in my said will directed:" the question then is, whether the words of the will ought to be imported into the codicil? It would be difficult to do that, because the personal estate was not given to John Graves. The codicil then contains a direction that, in case J. Graves should be under the age of 31 at the time when the estates shall devolve upon him, he should not take possession of them until he attained that age; but that the rents should be accumulated, by the trustees, for the use of him and his heirs. The codicil then directs that, in failure of issue of J. Graves, the testator's estates and effects shall go and descend as by his will directed. The devise over in failure of issue, necessarily confers, on J. Graves, an estate large enough to take in all the issue who are to fail before the gift over is to take effect.

The will directs on whom the estates are to devolve [*544] on failure of issue *male* of J. Graves, but *not on failure of his issue in general; nor does it contain any direction on whom the personal estate is to devolve on failure of his issue. There is no way in which the certificate of the learned judges can be supported, except by holding that the words: "as in my will directed," reiterate the words of the will, and that the words: "in failure of issue," mean: "in failure of such issue." But there is no case in which a devise to a man and his heirs in strict entail, has been cut down to issue male, and the words: "failure of issue," to failure of issue male. The effect

of those expressions has never been so limited, as to exclude the daughters of the devisee or the issue female of his sons. In *Morse* v. *Lord Ormonde*,(*a*) the testatrix devised estates to her daughter for life, with remainder to the daughter's first and other sons in tale male, with remainder to her daughters as tenants in common in tail, with remainder, in default of all such issue of the daughter, to trustees, for one thousand years, upon trust to raise such legacies as the testatrix should give by a codicil, and to pay the same to the persons to be therein named, with remainder to the testatrix's husband in fee. Then, by a codicil, she gave certain legacies, from and immediately after the decease *and failure of issue* of her daughter, to persons therein named. The question was whether the gift of the legacies was not too remote; as the words, "failure of issue" described an event which could not take place while there were female issue of the sons, or any of the descendants of such female issue, in existence; but the estates were not given to female issue of the sons or to their descendants. In that case, Sir John Leach, V. C., and afterwards, Lord Eldon, C., held that the gift of the legacies was not too remote. Lord Eldon, towards the *conclusion of his judgment, says: "I take the question [*545] to be this: whether, on the whole contents of one and the same instrument not referring to another instrument and misreciting the effect of it, it is not according to the true meaning of the testatrix, to construe the words, 'failure of issue,' in the passage which occasions the doubt, to be failure of such issue as were mentioned in the prior limitations? Such is, in my opinion, the true construction of the will." In that case, therefore, the words: "failure of issue," were held to exclude the female issue of sons and their descendants, but not to exclude the daughters of the devisee and their sons. Besides, in that case, the term was created for the purpose of raising the legacies; and, therefore, it was reasonable to infer that the legacies were to be raised as soon as the term (to which the objection of remoteness did not apply) commenced; and that circumstance enabled the Court to

(*a*) 5 Madd. 99; and 1 Russ. 382.

modify, as it did, the words in which the gift of the legacies was expressed.(*a*) In *Bristow* v. *Boothby*,(*b*) an estate was settled on the husband and wife for their lives, successively, with remainders to their first and other sons in tail male, with remainder to the daughters in tail, with remainder to the survivor of the husband and wife in fee: and it was provided that, in case there should not be any child or children of the marriage, or, there being such, all of them should die without issue and the husband should survive the wife, the wife should have power to charge the estate with 5,000*l*. The question, which, it is to be observed, arose on the language of one and the same instrument, was whether the power was not too remote; and Sir John Leach held that it was so. His Honor says: "There can be no doubt that, [*546] if it had been *pointed out to the parties, that the estate was not limited to all the issue of the marriage, and that the power expressed was, therefore, too remote, the deed would have been altered, and that the power and the limitations to the issue, would have been made to correspond. But, there is nothing in this instrument which enables me to say whether this would have been effected by extending the limitation to the sons in tail general, or by directing that the power should arise upon the failure of the particular issue of the marriage who were inheritable under the settlement as it is now framed. I am compelled, therefore, to construe the deed as I find it, and to say that the event on which the power is to arise, being too remote, the demurrer must be allowed." It is plain, therefore, that, in that case, Sir John Leach thought that there had been an oversight in preparing the settlement; but that learned Judge did not think that he was at liberty to interpolate the word "such." The concluding observations in the judgment, too, apply to the present case; for here, it is impossible to say what the testator would have done if he had been told, when he was making the fourth codicil, that the limitations in his will did not include all the issue of his grandson: he might have struck out the reference to his will. In a note to *Morse* v. *Lord Ormonde*, there is the

(*a*) See 5 Madd. 114.

(*b*) 2 Sim. & Stu. 465.

case of *Bankes* v. *Holme*,(*a*) which has a very close application to the present. There lands were settled, after limitations to the husband and wife for their lives, on the first and other sons of the marriage in tail male, remainder to the daughters in tail, remainder to the husband in fee. The husband, afterwards, made his will, and, after reciting that, under the settlement, he was seised of the reversion *in fee of the estates, ex- [*547] pectant upon the contingency that there should be no child or children of the marriage, or, there being such, all of them should die without issue, he devised the reversion in case he should die without leaving any chhildren or child, or, there being such, all of them should happen to depart this life without issue lawfully begotten: and it was held that the devise was void, that is, that the failure of issue spoken of in the will, could not be confined to the failure of issue provided for by the settlement. That case peculiarly applies to the present. There were two instruments, and the second showed an inaccurate recollection of the first. In *Wight* v. *Leigh*,(*b*) the testatrix devised an estate to the plaintiff in the cause, and, after his death, to his first and other sons; and, in default of male issue, she gave the estate to his eldest and other daughters in tail male: and it was held that, under the words: "in default of male issue," the plaintiff took an estate in tail male. *Langley* v. *Baldwin*,(*c*) is a case to the same effect. We trust that the Court will be of opinion that the certificate in favor of John Graves taking an estate for life only, is not satisfactory.

Mr. *Koe* cited *Robinson* v. *Robinson*,(*d*) *Doe* v. *Smith*,(*e*) *Doe* v. *Goldsmith*,(*g*) *Gretton* v. *Haward*,(*h*) *Ellicombe* v. *Gompertz*,(*i*) *Pierson* v. *Vickers*,(*k*) and referred to the opinions expressed by Lord Eldon and Lord Redesdale in *Jesson* v. *Wright*.(*l*)

(*a*) 1 Russ. 394.
(*b*) 15 Ves. 564.
(*c*) 1 Eq. Ab. 185; see 5 Adol. & Ell. 52.
(*d*) 1 Burr. 38.
(*e*) 7 T. R. 531.
(*g*) 7 Taunt. 209.
(*h*) 6 Taunt. 94.
(*i*) 3 Myl. & Cr. 127.
(*k*) 5 East, 548.
(*l*) 2 Bligh, 1; see pages 49, 56, *et seq.*

[*548] *Mr. *Knight Bruce*, Mr. *Wigram*, Mr. *Girdlestone*, Mr. *Sharpe*, Mr. *Bazalgette*, and Mr. *Patch*, appeared for the defendants; but

THE VICE-CHANCELLOR, without hearing them, said: It very much struck me, when this case was brought before me on Saturday, (and, since that time, I have read over the case and all the cases that were cited,) and I must now say that there is no sufficient ground for disturbing the certificate of the Court of King's Bench. Because, if the matter had been presented to the notice of the Court, independently of the decision made in the House of Lords, where the judgment of the Exchequer Chamber was affirmed which reversed the judgment of Chief Baron Alexander, I cannot but think that there would have been very strong ground for holding, from the words of the fourth codicil, (which are untechnical in the highest degree, and which do not fall within the rule that Mr. *Koe* has cited from the mouth of Lord Redesdale, namely, that technical words shall have their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise,) that the true intent was to make the variation, such as it is, by giving all the freehold, copyhold, and personal estate in the manner in which he made the particular limitation of the real estate in the will.

The expression is: "unto my grandson John Graves and his heirs, in strict entail." Now those, to be sure, are, to a certain extent, words of a popular nature; but, nevertheless, the words, "strict entail," have acquired a certain technical sense; and, *prima facie*, if a testator talked of settling an estate on a man and his heirs in strict entail, I do not suppose that any one

[*549] in the *profession, would imagine that it was intended that the first taker should be tenant in tail, but that he should be but tenant for life, and that those persons who were designated as heirs, whoever they might be, should take in succession. Then the testator says: "as in my said will directed." There you have a plain reference, without straining the words at all, to the particular mode of limitation which, by the will, was made applicable to the estates thereby given. Then he directs:

"in case the said John Graves, shall not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years; but that the rents and profits shall accumulate." Now, if you hold that the true intent of this is, that J. Graves shall take as tenant in tail, that clause becomes void: for J. Graves has nothing to do but to suffer a common recovery, and there is an end of it. Whereas, it is plain that the testator meant that that should be a part of the provision; and it cannot be made to take effect except by holding that John Graves takes an estate for life. Then the testator directs that the accumulations shall be in the hands of the trustees for the use and benefit of his grandson and his heirs; which seems to imply that the accumulation shall be for the use and benefit of him and his heirs, in the same way in which they are to enjoy the estates, that is, that the heirs should take them in remainder after J. Graves. Then the testator says: "and, in failure of the issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed." Now, if a strict construction were given to the words: "in failure of issue they shall go and descend,"
*the direct effect would be to prevent their going and [*550]
descending at all as in the will directed: because the limitation over would be void as being too remote; it being made to take effect on a general failure of issue, without their having been, in the will, a limitation to issue co-extensive with the general expression "issue," found in this particular clause. It appears to me, therefore, that the mode of construction, so far from effecting the intention of the testator, would manifestly defeat it. And, on the whole, and especially when I consider what view was taken of the case, with respect to the Plomer Hill estate, in the House of Lords, my opinion is that it would be too much to say that the certificate of the Judges of the Court of King's Bench is wrong: and my own opinion is that it is right.

There is only one observation which I have to make on the case in the House of Lords, which is this. It is very remarkable that Lord Chief Justice Tindal, in giving the opinion of all the

Judges, states that they were not all agreed on all the parts, but that, though they did not all agree in every particular part of the case, they all agreed in the general result. It is very remarkable that, for the purpose of putting a construction on a devise of real estate, His Lordship expressly refers to the second and third codicils which were not duly attested;(*a*) and therefore, there might have been some cavil against some portions of the reasoning. Now, however, that course of reasoning is likely to be established: because all testamentary instruments,
[*551] *whether they relate to real estate or to personal estate only, must have the same attestation.

I think that I ought not to disturb the certificate.

By the order made in the cause on the 9th of December, 1833, it was declared that the testator's residuary real estates, were charged with the four following annuities, or yearly rent-charges in favor of Mrs. Hicks, namely, one of 300*l.* and another of 100*l.* under the will; one of 100*l.* under the first codicil, and another of the same amount under the fourth codicil: and with an annuity or yearly rent-charge of 100*l.* in favor of Mr. Hearle: and it was further declared that the annuity or yearly rent-charge of 300*l.* was a primary charge to the several other annuities or yearly rent-charges given by the will and codicils, and that those annuities or yearly rent-charges were charged on the said estates without any priority between them.(*b*)

The testator's general personal estate having proved insufficient for the payment of his debts, and the rents of the residuary real estates, after paying an annuity and the interest of a sum in gross which the testator had charged on the estates in his lifetime, being inadequate to pay the annuities declared to be charged on the estates by the will and codicils, those annuities became greatly in arrear, and, in 1838, the arrears due to Mrs. Hicks, amounted to 3,479*l.*, and had since increased.

(*a*) In the report of the case, it is stated that the will and codicils were duly executed to pass real estates. See 8 Bing. p. 479.

(*b*) See *Graves* v. *Hicks*, ante, Vol. VI. p. 391

It was contended, on behalf of Mrs. Hicks and Mr. Hearle, that, by the will and codicils, the annuities were charged upon the *corpus* of the residuary estates, *and, consequently, that the arrears ought to be paid of a sum of money which had been produced by the sale of timber on the estates, and, if that should not be sufficient, out of money to be raised by sale or mortgage of the estates. [*552]

Mr. *Girdlestone*, Mr. *Sharpe* and Mr. *Patch*, for Mrs. Hicks :— The annuities of 300*l.* and 100*l.* given to Mrs. Hicks by the will, are not merely charged upon the estates, but the estates are devised subject, expressly, to those annuities. Therefore, John Graves and his issue take an estate of inheritance subject to annuities which are to be raised and paid, half-yearly, on certain prescribed days. Can it be contended, then, that Mrs. Hicks is not to receive her annuities half-yearly, but they are to be allowed to run in arrear and the arrears to go on accumulating, and then, perhaps, doled out not to her but to her personal representatives?—[THE VICE-CHANCELLOR :—Is there any trust created for payment of the annuities? Is there anything given but a legal rent-charge? Where an annuity is given to A. for life, with powers of distress and entry, and the estate on which the annuity is charged, is devised to B. for life with remainders over, it is not the habit of this Court to direct the annuity to be raised by sale or mortgage of the estate, except in cases where the Court finds it necessary to sell or mortgage the estate for payment of the testator's debts. If the mere grant of an annuity entitles the annuitant to have the estate either sold or mortgaged, why do conveyancers vest a term in trustees in trust to sell, in addition to giving powers of distress and entry to the annuitant?] The decision in *Cupit* v. *Jackson*,(*a*) seems to answer *the objection which your Honor has just stated. In that case it was treated as clear that the arrears of the annuity might be raised by sale or mortgage of the property charged, notwithstanding powers of distress and entry were given to the grantee.—[THE VICE-CHANCELLOR : There the annuitant [*553]

(*a*) Maclel. 495; and 13 Pri. 721.

was dead, and, consequently, nothing further could become due in respect of the annuity.]—It appears, from the report, that Sir W. Alexander, C. B., expressly repudiated that ground of decision.

Mr. *Patch* said that, by a former order in the cause, the Court had directed money for payment of the costs of the suit, to be raised by sale or mortgage of the estates; and, therefore, the case fell within the principle of *Stamper* v. *Pickering*.(a)

Mr. *Knight Bruce*, Mr. *Wigram* and Mr. *Bazalgette* for Mr. Hearle: There is no intention, either expressed in or to be impiled from the will and codicils, that the rents of the estates were to be the only fund for payment of the annuities. The object of conveyancers in inserting powers or trusts for sale in annuity deeds, is merely to enable the grantee or his trustee to do that which this Court would do for the annuitant. The rents of a mortgaged estate, are the primary fund for paying the interest on the mortgage money; but, if they are not sufficient, the mortgagee, may resort to the *corpus* of the estate. If a judgment creditor has sued out an *elegit*, courts of equity will raise the debt at once, and not compel the judgment creditor to wait until the rents satisfy it.

[*554] *We trust that, at all events, the Court will direct the arrears of the annuities to be discharged out of the timber-money.

Mr. *Jacob* and Mr. *Koe*, for the plaintiff: In *Stamper* v. *Pickering* the estates had been sold for payment of the testator's debts, and the income of the proceeds which remained after payment of the debts, was not sufficient to pay the widow's annuity. Besides, the estates were devised to the children, subject, expressly, to the yearly sum of 50*l*. (which was not given as a rent-charge:) and, of course, the widow was entitled to be paid in full, before the children could take anything. In *Cupit* v.

(a) Ante, Vol. IX. p. 176.

Jackson, the annuitant was dead, and the bill was filed by his executrix. When an annuitant dies, the whole amount that can become due in respect of the annuity, is ascertained, and, to some extent, there is a change in the character of the charge.

THE VICE-CHANCELLOR :—The case of *Cupit* v. *Jackson* has no relation whatever to the present case. There, John Jackson the elder, (who seems to have been seised in fee,) on the occasion of the marriage of his daughter, Elizabeth Jackson, with a person of the name of Thomas Brailsford, settled the estate so that there should be a certain annuity payable to himself for life, then an annuity payable to his wife for life, and then an annuity payable to Thomas Brailsford. Hannah Jackson, who was the wife of the settlor, died in the year 1778; and then John Jackson married a second time; and he had issue, by that marriage, a son, John Jackson, and a daughter, who also was named Elizabeth, against whom, by mistake, the bill seems to have been filed. She had no interest. John Jackson, the settlor, by his will, as stated on the face of the case, devised *the tenements charged with the annuity, to John [*555] Jackson the younger, in fee, and died in the year 1808, and Thomas Brailsford then became the sole annuitant, and the annuity was paid to him, with more or less regularity, during his life. Then he died, having, by his will, appointed Mary Cupit his executrix. She filed the bill against John Jackson the younger, who, at that time was seised in fee of the estate subject to the arrears of the annuity. The whole amount of those arrears were then finally determined; and, in that case, there being but one demand, which, at all events, must, in some manner or other, have been raisable out of the estate, the Lord Chief Baron thought that, in that case, the whole amount of the arrears having been ascertained, and the estate charged with the annuity being in the hands of the defendant who was seised in fee simple of it, it was right that the amount of those arrears should be raised by the sale or mortgage of the estate. Consequently, as it appears to me, it has no relation whatever to the present case: because, in the present case,

the estate out of which it is proposed that the arrears of the annuity shall be raised, happens to be still subject to settlement, as to part, on Mrs. Hicks for life, and subject thereto, on Mrs. Hearle for life, with remainder to John Hicks for life, with certain contingent remainders to the first and other sons in tail, or in some other way, (for I do not mean to give any opinion as to what estates his issue take,) with certain remainders over. The annuitant being alive, and some arrears having become due, the amount of which arrears I admit is now ascertained, it is proposed that this Court shall order the amount of those arrears to be raised, by sale or mortgage, out of the settled estate. However, no case has been produced as an authority for such
[*556] a proceeding; and my opinion is that, unless *the Court finds it necessary to make a decree for the sale of the estate for some other purpose, there is no ground whatever for making a direction that the amount of those arrears (which, it is true, are now ascertained, but which will be liable, very probably, in the course of a succession of years to fluctuate,) shall be raised in the manner proposed; for I do not understand that it is necessary now to give any direction for the sale or mortgage of the real estate for any other purpose.

My opinion, therefore, is that all that can be done at present, is to let the matter go on; and if the future rents increase, the arrears will be diminished, and, for aught I know, may be ultimately paid.

I feel great reluctance to do that which is novel, and which is not supported by any principle that I have heard adduced, or by any case that has been cited.

*Jones *v.* Price. [*557]

1841: 29th January and 2d February.

Testator appointed three persons and their respect heirs and assigns, his executors, and gave to them and to their respective heirs and assigns all his real and personal estates, in trust for the purposes after set forth; and first, that they and their respective heirs and assigns, should sell his real estates; and he empowered them and their respective heirs and assigns, to convey the estates, and to give receipts for the consideration-money. He then requested the executors of his will to sell his farming stock, furniture, &c., and, out of the moneys so arising and all other portions of his personal estate, he required them and their respective heirs and assigns to pay all his debts, &c. One of the trustees and executors died. The two survivors agreed to sell the real estates.

The Court, in a suit for a specific performance of the agreement, rejected the word "respective;" and held that the two surviving trustees and executors, could sell and convey the estates to the purchaser; and that the debts were charged on the proceeds of the real estates, and, consequently, that the receipt-clause was unnecessary.

Richard Willding, by his will, dated the 29th of January, 1820, appointed Thomas Longueville Jones, Charles Thomas Jones, and James Taylor, and their respective heirs and assigns, the executors thereof; and, after devising certain parts of his real estates and giving certain legacies, he expressed himself as follows: "I do hereby give and devise unto the said Thomas Longueville Jones, Charles Thomas Jones, and James Taylor, and to their respective heirs and assigns, all and every the residue and remainder of my estates, both real and personal, forever, in trust for the purposes hereinafter set forth and declared: and, first, that they, the above-named executors and devisees, in trust of this my will and their respective heirs and assigns, shall and do sell and dispose of all my real estates, so devised to them, by public auction or private bargain and in one or more lots, as may appear to them the most advisable, and as soon after my decease as a purchaser or purchasers can be met with possessing the means to pay a fair and marketable price for the same; and I hereby authorise and *empower the said T. L. Jones, C. T. Jones, and J. Taylor and their respective heirs and assigns, so to sell, release, and convey all the real estates herein de- [*558]

vised to them, and to give legal receipts for the consideration-money that may be paid to them for the same; and I do hereby declare it to be my will that, after such receipts so given, the purchasers respectively shall be exonerated and discharged from all obligation as to the future appropriation of the money under the trusts of this my will: and I further request the executors of this my will to sell and convert into money all my farming stock, furniture, &c., as soon after my decease as to them may appear proper, but without prejudice, as to the furniture, to the accommodation hereinbefore given to my affectionate wife, Diana; and, out of the moneys so arising, and all other portions of my personal estate, they, the executors of this my will, and their respective heirs and assigns, are required to pay all my just debts, my funeral expenses, and the sums of 3,000*l.* and 1,000*l.* to my faithful wife Diana, and the following legacies, namely: to Miss Sophia Harrison, 150*l.*; to my servant, John Armor, 150*l.*, &c.; and I hereby will and dispose of all the residue or surplus proceeds of all my real and personal estates, in manner following, namely: that they, the said T. L. Jones, C. T. Jones, and J. Taylor, and their respective heirs and assigns, shall place all the said residue and surplus proceeds in some of the public funds, in their joint names, or upon mortgage of some real estates of land, as may appear to them the most proper; and all the dividends and interest that may arise and become due therefrom, is to be received by the executors and devisees in trust of this my will, or their respective heirs and assigns, and the produce by them paid, unto my nieces, Margaret Tattersall, Jane [*559] Tattersall, &c., &c., *equally between them, or equally between the survivors of them, and wholly to the last survivor of them, during the term of her natural life; and, on the demise of such last survivor, I hereby give and bequeath one moiety of such principal sum to all and every the child or children of the said Jane Tattersall, equally between them; and I hereby give and bequeath the other moiety of such principal sum unto all and every the child or children of my nephew Philip Tattersall, equally between them, and, in case of the failure of the issue of the said Jane or Philip, the whole of the said

principal unto the child or children of the other: in case the said Jane and Philip shall die issueless, I then give and bequeath one moiety of the said principal sum unto my niece, Margaret Jones, and to her child or children, equally between them: in the case of my said niece Margaret Jones dying issueless, I hereby give and bequeath such moiety of the said principal sum unto the heir-at-law of Elizabeth Willding: and I do hereby give the other moiety of the said principle sum unto the above-named Thomas Longueville Jones, Charles Thomas Jones and James Taylor, or to the heir-at-law of each of them respectively, and to be equally divided between them; and I do hereby declare it to be my will that my said trustees and executors respectively, and their respective heirs, executors and administrators shall be accountable only for such moneys as they shall actually and *bona fide* receive, and that the one shall not be answerable for the acts or defaults of the other or others of them, but each of them for his own acts and defaults only."

The will was proved by Thomas Longueville Jones, Charles Thomas Jones, and James Taylor, in July, 1821. T. L. Jones, (who, after the testator's death, assumed *the surname of Longueville,) died, having devised all estates vested in him as a trustee, to his son and heir, Thomas Longueville. [*560]

In March, 1839, which was some years after the death of Thomas Longueville Longueville, C. T. Jones and J. Taylor, as the surviving trustees of the first testator's will, agreed to sell the testator's residuary real estates to John Price, for 57,000*l.* On the title to the estates being investigated, Price was advised that Jones and Taylor alone were not competent to sell the estates, and to give a good discharge for the purchase-money; in consequence of which, another agreement for the sale of the estates was entered into between Price, of the one part, and Jones, Taylor and Thomas Longueville, as the heir and devisee of the trust estates of his late father, of the other part. The title was afterwards approved of, subject to the following questions, namely, whether Jones and Taylor alone, or whether they and Thomas Longueville were competent to sell and convey the estates to

Price and to give a good discharge for the purchase-money, or whether the parties beneficially interested in the purchase-money ought not to join in giving the discharge?

The bill was filed for a specific performance, by Jones and Taylor, against Price and T. Longueville. Price raised the above-mentioned questions by his answer, and also submitted that, according to the true construction of the will, the purchase-money was not made liable to the payment of the testator's debts.

Mr. *Knight Bruce* and Mr. *Purvis*, for the plaintiffs:

[*561] The questions in this case have arisen in consequence *of the testator having used the word "respective" in his will. It is evident that he did not know the meaning of that word; but we contend that the trustees took as joint tenants. *Knight* v. *Gould*.(a) If, however, as the purchaser's counsel will insist, the word "respective" had the effect of making the trustees tenants in common, then the two surviving trustees, together with the heir and devisee of the deceased trustee, (who is willing to join with them,) can make a good conveyance, and give a valid discharge for the purchase-money. Moreover, the testator's debts are clearly charged upon the real estates; and, therefore, it is of no importance whether the surviving trustees alone, or jointly with the heir and devisee of the deceased trustee, are or not enabled, under the receipt clause, to give a valid discharge for the purchase-money. The testator devises all the residue and remainder of his estates, both real and personal, to the trustees in trust for the purposes afterwards set forth: so that, at the outset, he throws all the property into one mass. He then directs the trustees to sell his real estates, and his farming stock, furniture, &c., and, out of the moneys so arising and all other portions of his personal estate (that is, what has become personal by being sold,) to pay his debts, funeral and testamentary expenses and legacies; and then he disposes of all the residue or surplus proceeds of all his real and personal estates.

(a) 2 Myl. & Keen, 295.

The will is so constructed, that if the debts are not payable out of the proceeds of the sale of the real estates, the legacies are not; but that cannot be contended for a moment. There being then a clear charge of debts, there was no necessity for inserting any receipt-clause in the will; and the objection which is founded on that clause, is of no weight.

*Mr. *G. Richards*, Mr. *Hodgson*, and Mr. *Bagshawe*, for [*562] the defendant Price: It often happens that a title may be made in one of two ways: but, if they are inconsistent with each other, the Court must decide which of them is the right way. It is very doubtful, whether the legal estate is now vested in the plaintiffs, or in them and the defendant Longueville. *Doe* v. *Green*.(a) If, on the one hand, the purchaser pays his purchase-money to the plaintiffs and takes a receipt from them, but ought to have paid it to and taken a receipt from the defendant Longueville as well as the plaintiffs, the *cestui que trusts* may make him responsible for it, if it is misapplied. So, on the other hand, if he pays it to the three when he ought to have paid it to the two, the *cestui que trusts* may make him responsible for it. Who are the executors of the will? Not only the three gentlemen who are named, but they and their respective heirs and assigns; and they and their respective heirs and assigns are to pay the debts. *Townsend* v. *Wilson*,(b) *Bradford* v. *Belfield*,(c) *Hall* v. *Dewes*.(d)

Mr. *Parry*, for the defendant Longueville, said that his client was ready to join in the conveyance and receipt, if required so to do. He referred to *Fisher* v. *Wigg*,(e) in order to show that

(a) 4 Mees. & Wels. 229. (b) 1 Barn. & Ald. 608.

(c) Ante, Vol. II. p. 264.

(d) Jac. 189. On *Townsend* v. *Wilson* being cited, the Vice-Chancellor said that Lord Eldon always considered that case to have been wrongly decided. Upon which *Hall* v. *Dewes* was cited, in order to show that, although Lord Eldon disapproved of the decision, he would not, in consequence of it, compel the purchaser in *Hall* v. *Dewes* to take the estate which was the subject of that suit.

(e) 1 P. W. 14.

it was doubtful whether the trustees took as joint tenants or as tenants in common.

[*563] *Mr. *Knight Bruce*, in reply, said that the persons named in the will, were the executors, and were the persons by whom the debts were to be paid; and that the superadded words: "their respective heirs and assigns," were surplusage and nonsensical; that the will was to be construed so as to give them an estate commensurate to their office; and that the word "respective," was not inflexible, but admitted of being modified, especially in construing the language of a will.

THE VICE-CHANCELLOR:—This case must be decided, like many other cases upon wills, by looking at all the language from the beginning to the end of it; and any person who takes the trouble to do so, will see that it abounds in nonsense.

Before I comment on the will, I will just observe upon the cases of *Townsend* v. *Wilson*, *Hall* v. *Dewes* and *Bradford* v. *Belfield*.

In the case of *Townsend* v. *Wilson*, a question arose upon the construction of a deed, by which a power was given, to three trustees and their heirs, to sell the estate for such price in money as to them or their heirs should seem meet; and, one of them having died, it was held that a good conveyance could not be made by the two survivors alone.

In the case of *Hall* v. *Dewes*, it was directed by the articles, that a power should be contained in the settlement to be made, to enable the husband, with the consent of the three persons named, their heirs or assigns, but not otherwise, to make
[*564] sale of the messuages, *&c., for the best price or prices that could or might be obtained, or for such equivalent in lands, as should, by the same three persons or the survivor, be thought reasonable; and the articles also provided that any variation might be made in the form and order of the articles and the uses and trusts thereof, which would better effectuate the intention of the parties thereto as therein

expressed. Then a settlement, reciting the articles, was made, by which a power of sale was reserved to the husband, to be exercised by him with the consent of the three persons, or the survivors or survivor of them, or of the heirs or assigns of such survivor, or of the trustees or trustee for the time being; and the persons who were to give receipts for the purchase-money, were the same as those who were to consent to the sale; and they were also the trustees of the settlement. One of them went abroad, and another trustee was appointed in his place. Then another died; and, before his place was supplied, an agreement was entered into for the sale of the estate to the persons under whom the plaintiffs claimed; and it was conveyed to them by deeds in which one of the original trustees and the new trustee joined. The objection was that the power of sale had not been duly exercised.

THE LORD CHANCELLOR observed that, if the intent was that the three persons named in the articles, should consent, the clause as to varying the settlement to effectuate the intention, would not help the case. And then his Lordship asked a question with respect to *Townsend* v. *Wilson*, and added that he did not agree with the decision in that case: and I heard him express himself to the same effect, when he was giving an opinion in *Jervoise* v. *The Duke of Northumberland* *before the case of *Hall* v. *Dewes* came on for argument before him. But it is to be observed that, in that case, the words were, "their heirs *or* assigns." [*565]

In *Bradford* v. *Belfield*, there was a conveyance by way of mortgage made to Whidborne, (who was a trustee for the mortgagee, Baker,) his heirs and assigns, upon special trust and confidence, in him and his heirs reposed, that he and they should sell; and then it appears that Whidborne's heir, with the consent of the executors of Baker, conveyed to Bradford in fee in trust to sell. Bradford afterwards sold to Belfield: and the question was whether that was proper; and I held that that mode of proceeding was not justifiable under the provisions of the original deed.

Now, in this case, we have to put a construction on the language of a will; and the rules of construction which are applicable to such instruments, are not applicable to the case of a trust declared in a deed: because the Courts construe wills with more laxity and with more attention to their various passages, than are allowable in construing deeds.

The testator, in this case, sets out with nominating and appointing his three friends, T. L. Jones, C. T. Jones and J. Taylor, and their respective heirs and assigns, the executors of his will. Now it is evident that he had a very imperfect notion as to what the words: "their respective heirs and assigns," meant; and I rather think that you will see, upon the whole construction of this will, that the word "respective" may be very well rejected without injuring the testator's meaning; and that, in fact, unless you do reject it, you cannot act on the will at all, as far as the real estate is concerned. [*566] *Then he seems, in the subsequent part of the will, to have known how to give an estate in fee simple, for that he does in plain terms.

I should have observed, with respect to the first clause, that, according to my apprehension, the Ecclesiastical Court never would consider that the executorship was to be split and go to the heirs of the three, or to the assigns of the three. The assigns of what? I apprehend that, in the event of all these three persons dying, the executor of the surviving executor, if he proved the will in the same Court, would be the personal representative of the testator; so that, in that respect, the words: "their respective heirs and assigns," must be rejected as nonsensical. Then he goes on thus: "I do hereby give and devise unto the said Thomas Longueville Jones, Charles Thomas Jones and James Taylor, and to their respective heirs and assigns, all and every the residue and remainder of my estates, both real and personal, for ever, in trust for the purposes hereinafter set forth and declared; and, first, that they, the above-named executors and devisees in trust of this my will and (not or) their respective heirs and assigns, shall and do sell." Now, if nobody was to sell except the three trustees and their heirs and assigns,

how could there ever be a sale at all? How was it possible that the heirs could join with the ancestors? How was it possible, before any conveyance was made, that there could be any assign to join either with the heirs or with the ancestors? If the words are to be taken as they stand, they are nonsense: because, there being no severance in the execution of the trust, the trust is to be performed by every one and their respective heirs and assigns. Then he authorizes and empowers the same three gentlemen: "and their respective heirs and as-
*signs, so to sell, release and convey, all the estates here- [*567]
by devised to them, and to give legal receipts for the consideration-money that shall be paid to them for the same:" and, afterwards, he says: "I do hereby declare it to be my will that, after such receipts so given, the purchasers respectively shall be exonerated and discharged from all obligations as to the future appropriation of the money under the trusts of this my will: and I further request the executors of this my will, to sell and convert into money, all my farming stock, furniture, &c., as soon after my decease as to them may appear proper, but without prejudice, as to the furniture, to the accommodation hereinbefore given to my affectionate wife Diana; and, out of the moneys;" —he has before spoken only of money, in the singular number: —"and out of the moneys so arising and all other portions of my personal estate, they, the executors of this my will, and their respective heirs and assigns are required to pay, &c." It appears to me, therefore, that the fund out of which they are required to make the payments, is made up both of the money that was to arise from the sale of the real estates, and the money that was to arise from the personal estate; otherwise there would be a useless change of language, and the word "moneys," would be made applicable only to one sort of money, which was before named: but, as the word "money," is used twice before, (once with respect to the real estate, and once with respect to the personal estate,) it appears to me that the most natural construction is that the word "moneys," applies to both descriptions of money. Out of that they are: "required to pay all my just debts, funeral and testamentary expenses, and the sums

of 3,000*l.*, and 1,000*l.*, to my wife," and several other legacies which are mentioned: and the trustees and execu-
[*568] *tors are required to pay those further sums out of the same fund. Then he says: "and I hereby will and dispose of all the residue or surplus proceeds of all my real and personal estates, in manner following." In my opinion, the natural construction of those words, is that the subject which he ultimately deals with, is the residue or surplus proceeds after paying the debts and making the other payments before directed. The consequence is that no clause making the receipts of the trustees sufficient discharges, is necessary, the purchaser not being bound to see to the application of the purchase-money.

Then the testator directs that the three trustees or their respective heirs or assigns, (so that he there changes the language,) shall place all the said residue and surplus proceeds in some of the public funds, in their joint names. Now, supposing the case was that the three trustees had died, and had left three heirs; what are they to do? They are to place the surplus proceeds: "in some of the public funds, in their joint names, or upon mortgage of some real estates of land, as may appear to them the most proper; and all the dividends and interest that may arise and become due therefrom, is to be received by the executors and devisees in trust of this my will, or their respective heirs and assigns." How was that possible? When once the fund was invested in the joint names, those only could receive the dividends who happened, in the ordinary course of law, to represent the parties in whose joint names the fund was placed. Therefore, there is an end, at once, to any meaning in the words: "the executors and devisees in trust of this my will or their respective heirs and assigns."

[*569] *Looking at the whole of this will, the proper course seems to be, to omit altogether the word "respective," and to construe the will just in the same manner as if that word was not there, and then it will be all plain and simple; because then the trustees, when they do sell, will invest in their joint names. The words: "heirs, and assigns," are inapplicable to the public funds: they must mean, "executors, administrators

and assigns " that is, the representatives of the joint body; for they alone can, by any possibility, receive the dividends of the joint fund.

Declare that the debts are charged on the proceeds of the sale of the real estates, and that the two plaintiffs can make a good title.

EEDES *v.* EEDES.

1841: 17th & 18th February.

A married woman who had left her husband and was living separate from him, but not in a state of adultery, held to be entitled to a settlement out of a sum of stock, to which her husband had become entitled in her right.

THE bill was filed, by a married woman, against her husband and the trustees of a sum of stock to which she, or her husband in her right, had become entitled, for a reference to the Master to approve of a proper settlement of the fund, no settlement or agreement for a settlement whatever having been previously made.

The plaintiff had left her husband in consequence, as the bill alleged, of ill treatment which she had experienced from him, and was still living separate from him. He did not contribute to her support; but she was endeavoring to maintain herself by keeping a school.

*Each party entered into evidence as to the conduct of the other; but there was nothing to show that the wife had been unchaste. [*570]

The question was whether the wife was entitled to a settlement out of the fund, notwithstanding she was living separate from her husband.

Mr. *Knight Bruce* and Mr. *G. L. Russell*, for the plaintiff, cited

Roberts v. *Roberts*,(a) *Watkyns* v. *Watkyns*,(b) *Carr* v. *Eastabrooke*,(c) *Ball* v. *Montgomery*.(d)

Mr. *Jacob* and Mr. *K. Parker*, for the plaintiff's husband, cited *Coster* v. *Coster*,(e) *Bullock* v. *Menzies*,(g) *De Manneville* v. *De Manneville*,(h) *Duncan* v. *Duncan*.(i)

Mr. *Lowndes* for the trustees of the fund.

THE VICE-CHANCELLOR:—I take it to be perfectly settled law, that, where a wife is entitled to a chose in action which consists of a principal sum and not merely income, she may file a bill, against her husband and the trustee, for a settlement. Circumstance of conduct on the part of the wife, may, certainly, exist under which the Court would not listen to her case. But that is not so here: for nothing has been shown to induce the Court to withhold a settlement, to which she is *prima facie* entitled. [*571] *The amount of the evidence is, that the wife has used very provoking language, and that the husband is of an irritable temper, and the effect was that she went from his house on a certain day, and has ever since lived separate from him. There is no evidence that she ever deviated from the conduct of a chaste wife; but, on the contrary, it is shown that she has lived in a penurious and laborious manner, and has supported herself by her own industry, without any assistance whatever from her husband. So far the husband's conduct is not free from blame. I, however, do not sit here to decide on the merits or demerits of the husband; but, having heard no reason why there should not be a decree, I think it ought to be referred to the Master, to approve of a proper settlement of the plaintiff's property.

(a) 3 Cox, 422.
(b) 2 Atk. 96.
(c) 4 Ves. 146.
(d) 2 Ves. 191.
(e) Ante, Vol. IX. p. 597.
(g) 4 Ves. 798.
(h) 10 Ves. 52; see 56.
(i) 19 Ves. 394.

HILLS *v.* HILLS.

1843: 20th April.

A cause set down before the Vice-Chancellor of England, was ordered to be transferred to another branch of the Court. Held, that the Vice-Chancellor of England had, nevertheless, jurisdiction to hear a petition in the cause, presented before the order of transfer was made.

THIS cause was set down to be heard before the Vice-Chancellor of England. After a petition had been presented in it, the cause was transferred to the Court of Vice-Chancellor Knight Bruce. The question was whether the Vice-Chancellor of England had, nevertheless, jurisdiction to hear the petition.

Upon the point being mentioned, by Mr. *Rasch*, for the petitioners,

THE VICE-CHANCELLOR said that the order of transfer left untouched everything that had taken place in the cause previous to that order, and, therefore, he was of opinion that he ought to hear the petition.

1841.—Sweet v. Cater.

[*572] *SWEET *v.* CATER.

1841: 3rd February.

By an agreement between an author and a bookseller, after reciting that the author had prepared a new edition of one of his works, and that the bookseller was desirous of purchasing it; it was agreed that Messrs. H. (printers) should print 2,500 copies of the work, in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay to the former, for the said edition, a certain sum by instalments, the first to be paid as soon as the edition was ready for publication, &c.: the work to be divided into three volumes, and to be sold to the public at 3*l.*

Held, that the bookseller was not merely a purchaser of 2,500 copies of the work, but was, in equity, an assign of the copyright of it, to the extent that he was to be the sole publisher of it, until the whole edition, consisting of 2,500 copies, should be sold; and, consequently, that a bill by him to restrain a piracy of the work, was not demurrable:

Held also, that, notwithstanding some of the passages alleged to have been pirated, were contained in the prior editions as well as in the new edition of the work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed.

The injunction having been granted on the plaintiff undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit at the trial, that the plaintiff was the legal proprietor of the pirated work.

THE bill stated that, for some years past, the plaintiff had carried on and still carried on the business of a law-bookseller and publisher in Chancery-lane; that, in 1805, the defendant, the Right Honorable Sir Edward Sugden, composed and caused to be printed and published a work called, "A Practical Treatise of the Law of Vendors and Purchasers of Estates;" that, at different times subsequent to that year, eight successive editions of the work were printed and published, and that Sir E. Sugden made various alterations in and additions to the work, in each of the successive editions; that, in 1839, Sir E. Sugden was the owner of and legally entitled to the copyright of the work and
[*573] of the several *editions thereof; that, in the beginning of that year, he prepared a 10th edition for publication, and, in that edition, he made very extensive alterations and additions to the work, and increased the same to nearly double the

size of the 9th edition; that in March, 1839, the plaintiff agreed with him for the purchase of the right of publishing the 10th edition, for the consideration and upon the terms and conditions after mentioned; that the agreement was reduced into writing, and, on the 28th of March, 1839, was signed by Sir E. Sugden and the plaintiff, and was as follows: "The Right Hon. Sir Edward Sugden having prepared a new edition (the 10th) of the Treatise of the Law of Vendors and Purchasers, and S. Sweet being desirous of purchasing the same, it is agreed that Messrs. Hansard shall print 2,500 copies of the work, in type and page corresponding with the 6th edition of the Treatise of Powers, at the sole cost of S. Sweet, and S. Sweet shall pay, to Sir. E. Sugden, for the said 10th edition, the sum of (The sum to be paid and the instalments by which it was to be paid were then mentioned. The first instalment was to be paid in cash, as soon as the edition was printed and ready for publication: the second instalment, by an approved bill payable four months after date; and the last instalment, by an approved bill payable eight months after date; and both bills were to be dated at the time the edition was ready for publication.) The work to be divided into three volumes, and to be sold, to the public, for 3*l.* in boards; but, should it exceed 111 sheets or 1776 pages, a proportionate increase is to be made in the charge to the public, and a proportionate addition made to the consideration to be paid by S. Sweet to Sir E. Sugden. Fifteen copies in boards to be delivered to Sir Edward, free from all charge or expense." The bill further stated that, in pursuance of the agreement, the plaintiff

*caused 2,500 copies of the 10th edition of the work, to [*574] be printed, by Messrs. Hansard, in three volumes, in the type and form specified in the agreement, and the said 10th edition of the work was published, by the plaintiff, on the 8th of December, 1839; that the plaintiff had paid, to Sir E. Sugden, the purchase-money agreed to be paid for the right of publishing the said 10th edition of the work, pursuant to the terms and provisions of the agreement; and had already sold a considerable number of the copies of the said 10th edition, but that a large number of the copies of such edition, still remained in his

hands unsold: that, in November, 1840, the defendants Carter and Maddox, who were partners as booksellers and publishers at Launceston, in Cornwall, published a work intituled: "A Practical Treatise of the Law relative to the Sale and Conveyance of Real Property, with an Appendix of Precedents, comprising Contracts, Conditions of Sale, Purchase and Disentailing Deeds, &c., by William Hughes, Esq., of Gray's Inn, Barrister-at-Law;" that the plaintiff had lately discovered (as the fact was) that the greater part of the last-mentioned work had been copied, word for word or with some colorable alterations, from the 10th edition of Sir E. Sugden's work, and without Sir Edward's knowledge or consent; that, although some of the passages which had been so copied, were acknowledged to have been taken from Sir E. Sugden's work, yet, by far the greater portion of them were copied without any such acknowledgment; that the printing and publishing of the passages which had been so copied, was a piracy, on the part of the defendants Cater & Maddox, of the 10th edition of Sir E. Sugden's work published by the plaintiff; that the defendants, Saunders & Benning, who were partners as law-booksellers and publishers in Fleet-street, were the
[*575] *London agents of Cater & Maddox, and, as such agents, had published and sold Hughes's work, in London; that the legal interest in the copyright of Sir E. Sugden's work so as aforesaid purchased and published by the plaintiff, had never been duly assigned to the plaintiff, and the same was still vested in Sir E. Sugden as the author: and that Cater & Maddox and Saunders & Benning insisted, as the plaintiff was advised the fact was, that Sir E. Sugden was, therefore, a necessary party to the suit.

The bill prayed that an account might be taken of all the copies of Hughes's work, containing passages copied from the 10th edition of Sir E. Sugden's work, published by the plaintiff, which had been published and sold by Cater & Maddox, and Saunders & Benning respectively, and of the loss and injury which had been sustained by the plaintiff, by the publication and sale by them respectively of the said work; and that the four last-named defendants might be respectively decreed to

make good and pay, to the plaintiff, such loss and injury, or, at any rate, that an account might be taken of the profits which had been made by them respectively by the publication and sale of Hughes's work; and that the same defendants might be respectively decreed to pay to the plaintiff the amount of such profits; and that they might be restrained from publishing, selling, or disposing of, or causing to be published, sold or disposed of, any copies or copy of Hughes's work, and that they might be decreed to deliver up to the plaintiff, to be cancelled, all such parts of the copies of the work so published by them which had been copied from the 10th edition of Sir E. Sugden's work, as were then in their possession or power.

*The defendants Cater & Maddox demurred to the bill, for want of equity. [*576]

Mr. *Jacob* and Mr. *Willcock*, in support of the demurrer: The bill states that the legal interest in the copyright of Sir E. Sugden's work, has never been assigned to the plaintiff, and that the same is still vested in the author: we, however, contend that the equitable, as well as the legal interest in the copyright, is still vested in Sir Edward; and that all that the plaintiff has acquired under his agreement, is a license to sell 2,500 copies of the work. The plaintiff has purchased not the copyright, but a mere license to publish and sell 2,500 copies for his own benefit; and there his right ends. He has no exclusive license for any definite time: there is nothing whatever to preclude Sir E. Sugden from licensing as many more persons as he pleases, to sell copies of his work. An author may give an exclusive license to sell his work for the whole duration of his copyright: which, in substance, would amount to an assignment, in equity, of the whole interest in the copyright. So an author may grant an exclusive license to sell his work for two years, or for any other number of years short of the whole term of his copyright: and that would give the licensee the interest in the copyright for the number of years specified. But that is not the case here: the plaintiff has no exclusive right for any particular term; but only a license to sell a certain number of copies. He might have had

the exclusive right until he had sold the 2,500 copies; but he is not entitled even to that, under the agreement. If the plaintiff is supposed to have any exclusive right; for what length of time is that exclusive right to continue? The error in this [*577] case has arisen from not distinguishing *between a right to copies of a book, and a right to the copyright of the book. The plaintiff, in all probability, has sold copies of the book in question to his customers, and also to other law-booksellers; and he has no more right to file this bill than every purchaser of the book has. The language of the Copyright Act (54 Geo. 3, c. 156,) makes it quite clear that no one but the author or the proprietor of the copyright of a book, can sue in a case of piracy. In this case, the author has not given to the plaintiff even the right to print the work; for the name of the person by whom the copies are to be printed, and the type and page in which they are to be printed, are expressly prescribed by the agreement. When the copies have been printed by the person and in the manner prescribed by the agreement, then, and not till then, does the plaintiff acquire any right to them.

Mr. *Knight Bruce*, Mr. *Sharpe*, and Mr. *H. Sugden*, appeared for the plaintiff; but,

THE VICE-CHANCELLOR, without hearing them, said: It certainly would be most extraordinary if after Sir Edward Sugden has been engaged in so many publications, and has filled the office of Lord Chancellor of Ireland, he should not be able to make a contract between himself and his bookseller.

The question is whether it is not manifest, on the face of the contract, that the plaintiff has a right in the copyright of the 10th edition of the Treatise on the Law of Vendors and Purchasers. The bill states that, in March, 1839, an agree- [*578] ment was made by the plaintiff, with Sir *E. Sugden, by which, after reciting that Sir Edward had prepared a new edition (the 10th) of his Treatise of the Law of Vendors and Purchasers, and S. Sweet being desirous of purchasing the same, it was agreed that Messrs. Hansard should print 2,500 copies of the work, in type and page corresponding with the

sixth edition of the Treatise of Powers, at the sole cost of S. Sweet; and S. Sweet should pay, to Sir E. Sugden, for the said 10th edition, the consideration therein mentioned. Then follows the way in which the work is to be sold. It is to be divided into three volumes, and to be sold to the public, for 3*l.* in boards; but should it exceed 111 sheets or 1776 pages, a proportionate increase is to be made in the charge to the public, and a proportionate increase to be paid to Sir E. Sugden. Now, by this contract, there is an obligation which is binding on both parties. Sweet is to sell at a given price; and, therefore, Sir E. Sugden has bound himself to abstain from doing anything which might at all interfere with that act which Sweet was to do. Suppose that, before the 2,500 copies, which form the 10th edition, are sold, Sir E. Sugden, (to put a hypothetical case) should fancy that he had a right to sell another edition to another bookseller, with the immediate right of publication; I apprehend that this Court would certainly restrain him from doing so, on this contract. It is not merely optional, with Sweet, whether he will sell or not; but he is bound to sell, and to sell in a given manner. It is most probable that, when Sir E. Sugden drew this agreement, he was looking forward to the time when he might think it right to publish some subsequent edition; and he was taking care to impose an obligation, on Sweet, to sell; and, while he imposes that obligation, he is, himself, bound, *at the same time, to perform his [*579] part of the contract, which is, not to interfere with the sale of the book.

I think that, upon the plain construction of this contract, Sweet has obtained a right, in the copyright of the work, to the extent that he is to be at liberty to be the sole publisher of it until the whole edition, consisting of 2,500 copies, shall be sold. He, therefore, is an assign of the copyright in a limited sense. Consequently the demurrer must be overruled.

The demurrer having been overruled,

Mr. *Knight Bruce* and Mr. *Sharpe*, moved for the injunction.

They pointed out several passages in Mr. Hughes's work, as having been taken from the tenth edition of Sir E. Sugden's work.

Mr. *Jacob* and Mr. *Willcock* contended that Mr. Hughes's work was of quite a different character from Sir E. Sugden's, and could not be a substitute for it; that treating, as the former work did, of various branches of the law, it was allowable and even necessary to take some parts of it from a standard work like Sir E. Sugden's; and that, in doing so, Mr. Hughes had not transgressed the limits of fair copying; that some of the passages alleged to have been copied, were contained in the ninth and other prior editions of Sir E. Sugden's work; and, as the plaintiff sued as proprietor of the tenth edition only, he was not entitled to rely on those passages in support of his case; and that, at all events, the injunction ought to be granted, unless
[*580] the *plaintiff would undertake to try his right in an action at law.

THE VICE-CHANCELLOR:—In cases of this nature, if the pirated matter is not considerable, that is, where passages, which are neither numerous nor long, have been taken from different parts of the original work, this Court will not interfere to restrain the publication of the work complained of; but will leave the plaintiff to seek his remedy at law. But, in this case, it is plain that the passages which have been pointed out, have been taken from the plaintiff's book, and they are so considerable, both in number and length, as to make it right that this Court should interfere.

It was said that, with respect to some of those passages, the plaintiff had no right to complain, because they were contained in prior editions of Sir E. Sugden's work. But I do not think that that fact at all alters the case: for the entire copyright in all those prior editions, was vested in Sir E. Sugden, when he made the agreement with the plaintiff: and my opinion is that the effect of that agreement was to give to the plaintiff, as against Sir E. Sugden and all persons claiming under him, a right to insist that the matter contained in the 10th edition should not be published,

whilst he was performing his part of the contract, by selling that edition to the public. And, that being my view of the case, I think that, although the passages may be contained in some prior edition, yet, if they are contained in the 10th edition as well, the Court ought to prevent their being copied.

It was said that the injunction ought not to be granted unless the plaintiff would undertake to try his right at law: *and I think, if the defendants require it, that that [*581] term ought to be imposed on the plaintiff.

Sir E. Sugden having declined to permit the plaintiff to bring the action in his name, the defendants were ordered to admit at the trial, that the plaintiff was the legal proprietor of the copyright in the 10th edition of Sir E. Sugden's work.

SEELEY *v.* FISHER.

1841: 5th February.

Where there are two rival works, the Court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work.

FOUR editions of the Rev. Thomas Scott's Commentary on the Bible, were published in the author's lifetime. At his death he and another gentleman under his superintendence, were engaged in and had nearly completed the revising and improving of the 4th edition, with a view to the publication of a fifth. The 4th edition having been published several years before Scott's death, the copyright in it had expired. After his death, the plaintiff, who was the owner of the copyright in the revised and improved work, published it under the title of "The 5th Edition of Scott's Bible, with the Author's last Corrections and Improvements."

In January, 1841, the defendants, Fisher & Co., began to publish, in monthly numbers, an illustrated edition of Scott's Bible;

and advertised it in the public papers, and on the wrappers of the numbers, as a new and carefully revised edition of the work, and as intended to contain the whole, unadulterated labors of the author, not as re-edited by a different hand [*582] and an inferior mind, *but precisely as the learned commentator bequeathed them to the world; the edition being printed from the last which the author published in the vigor of life.

The bill alleged, in substance, that the publication of the advertisement was a fraud upon the plaintiff, inasmuch as it was calculated to induce the public to believe that the defendant's edition contained the author's last corrections and improvements, the copyright in which belonged to the plaintiff; whereas it did not contain any of those corrections or improvements, but the letterpress was merely a reprint of the 4th edition.

The bill prayed that the defendants might be restrained from selling or disposing of any more copies of their publication, having, on the wrappers or covers thereof, the advertisement or announcement before mentioned; and from printing, or publishing, or causing to be printed or published any advertisement, statement or announcement, purporting that their publication did or would contain the whole of the commentary and observations of the author as written by him or as bequeathed by him to the world, or the whole of the last corrections, improvements and additions made by the author, to his work.

Mr. *Knight Bruce*, for the plaintiff, now moved, *ex parte*, for an injunction as prayed by the bill: and

THE VICE-CHANCELLOR granted it on the ground that the defendants were selling their publication under a representation that it was the plaintiff's.

THE LORD CHANCELLOR, however, on the motion to dissolve being made before him, said that the whole terms of [*583] *the advertisement, and, especially, the words: "this edition being printed from the last which the author published in the vigor of life," (which were omitted in the injunction,)

referred only to the 4th edition, and represented that nothing but what was contained in that edition, was comprised or intended to be comprised in the defendants' publication; and, consequently, that the advertisement complained of, did not hold out to the public, that the defendants' work contained any matter which was the exclusive property of the plaintiff: that although it further alleged that any additional or other matter which was contained in any edition subsequent to the 4th, was spurious and of no value, that allegation, if untrue, was no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the plaintiff's edition.

GIBBS *v.* GLAMIS. [*584]

1841: 18th February.

A. instituted a suit against B. and C. respecting a sum of 4,000*l.*, D. also was made a party to the suit; but, having no interest, he disclaimed. A., B. and C. afterwards came to a compromise, in pursuance of which they executed a deed, assigning the 4,000*l.* to trustees, in trust to pay to D. his costs of the suit, and to divide the rest of the fund amongst A., B. and C. D., though he was not a party either to the compromise or to the deed, filed a bill against A., B. and C. and the trustees, to compel a performance of the trusts and payment of his costs. A demurrer by C., for want of equity, was allowed.

In 1838, a suit was instituted, by the late Rev. Selby Hele, against E. Fernie and R. Hibbert, respecting a sum of 4,000*l.*, being the arrears of an expired annuity of 400*l.* which had been granted by the Earl of Strathmore. Lady Glamis, S. B. Heming, and D. Heming, also claimed to be interested in the 4,000*l.* In November, 1839, the several claimants came to a compromise; in pursuance of which a deed dated the 9th of that month, was made between Fernie of the first part, Hele of the second part, Lady Glamis of the third part, the two Hemings of the fourth part, Hibbert of the fifth part, and Alexander Gibbon and Edward Western of the sixth part; and thereby, after reciting, amongst other things, that the parties to the deed of the first

five parts, had agreed to compromise their claims to the 4,000*l.*, and to have the same divided in manner thereinafter mentioned; those parties assigned the 4,000*l.*, to Gibbon and Western, in trust, in the first place, to defray the costs, charges and expenses, of all the parties to the deed, in or about the suit of *Hele* v. *Fernie* and others, or of the deed, or otherwise relating to their claims on the 4,000*l.*, as between solicitor and client, and also the costs of Gibbs, who was a defendant to that suit, and also the costs which Gibbon and Western might be put to in recovering or receiving the 4,000*l.*; and, in the next place, to pay 800*l.* to Hibbert, and 1,800*l.* to Hele, and the residue of the 4,000*l.* to Lady Glamis in full satisfaction of their respective claims on that sum; and the parties thereto of the first
[*585] five parts, released *each other from all actions, suits, claims and demands, in respect of the 4,000*l.*

The bill in this cause, to which Gibbon, Western, Hele's executors, Lady Glamis and the two Hemings, were defendants, after stating as above, alleged that the plaintiff was a defendant to the suit instituted by Hele, but that he had not any beneficial interest in any of the matters in question therein; and that, before the date and execution of the deed of the 9th of November, 1839, he appeared and put in his answer to the bill in Hele's suit, and disclaimed any beneficial interest in the 4,000*l.*, the plaintiff being, in fact, (if at all a necessary or proper party to the said suit,) only a formal party thereto; but that he incurred costs therein to a considerable amount, all of which still remained unpaid; that Gibbon and Western had received all or a considerable part of the 4,000*l.*, and to an amount more than sufficient to pay the costs, charges and expenses of all the parties in or about the said suit of *Hele* v. *Fernie*, and of the deed, or otherwise relating to their claims on the 4,000*l.*, as between solicitor and client, and also the plaintiff's costs provided to be paid by the deed, and also the costs which Gibbon and Western had been put to in recovering or receiving the 4,000*l.*, and that they had, in fact, out of the money received by them, paid all such costs, charges and expenses, except the plaintiff's costs, and had paid to Hibbert and to the executors of Hele, certain sums of money

on account of the 800*l.* and 1,800*l.*: that, on the 19th of February, 1840, the plaintiff gave a written notice to Gibbon and Western, that he had sustained considerable costs in the suit of *Hele* v. *Fernie* and others, and that such costs were unpaid, and that he was ready to have *the same taxed: that, on [*586] the 23d of May, 1840, Gibbon and Western sent, to the plaintiff, a letter which, after acknowledging the receipt of the notice, was as follows: "Having received such notice, we think it right to inform you that we are about to carry the trusts of the deed into execution without delay, and, in case you have any claim against us, as such trustees, for costs in the said suit, we request you will forthwith inform us by what right you make such claim, and what is the amount of it:" that, the plaintiff being absent from home when the letter was sent to him, his clerk, on the 30th of the same month, sent, to Gibbon and Western, a letter as follows: "*Hele* v. *Fernie* and others—Gentlemen: In answer to your letter of the 23d instant, I must refer you to the deed of the 9th day of November, 1839, under which you act as trustees for, amongst other purposes, the payment of Mr. Gibbs's costs of this suit, and to the notice, dated the 19th day of February last, which he served on you, and which you admit the receipt of. In his absence from town, I beg to send you, herewith, his costs of the suit, and which he will be willing to have taxed, according to the notice he served on you." The bill further stated that, on the 26th of June, 1840, Messrs. Western and Son, the solicitors of Gibbon and Western, sent, to the plaintiff, a letter as follows: "Sir, Messrs. Alexander Gibbon and Edward Western, as the trustees under the indenture of the 9th day of November, 1839, mentioned in your notice to them of the 19th day of February last, having proceeded to carry into execution the trusts of that indenture, summitted your notice and their letter to you of the 23rd day of May, and your reply of the 30th, with the bill of costs which accompanied the latter, to Lady Glamis, for her directions how to act, considering her, as being the *cestui que trust* under *the indenture of the 9th of November, 1839, en- [*587] titled to the residue of the funds therein mentioned, as

principally affected by your claim, upon the fund for costs. Lady Glamis, in reply, has given the trustees notice that she objects to your claim, and denies that you are entitled to be paid any such costs out of the fund, and requires the trustees not to pay you any such costs thereout. Under these circumstances, the trustees have, for the present, set apart and retained, in their hands, the sum of 99*l.* 12*s.* 6*d.*, the amount of the bill which accompanied your letter of the 30th day of May, and paid over the remainder of the fund already come to their hands. We have now, on behalf of the trustees, to require you, forthwith, to take such steps as may be requisite or proper to substantiate your claim for costs, and also to give you notice that, in the event of your not establishing your claim within a reasonable time from the date hereof, the trustees will pay over the 99*l.* 12*s.* 6*d.* to the parties entitled to the residue of the trust fund under the trusts of the deed." The bill charged that all the defendants had an interest in the execution of the trusts of the deed; and that, if Gibbon and Western had paid, out of the trust fund, any part of the 800*l.* and 1,800*l.* provided to be paid to Hibbert and Hele, without having paid, to the plaintiff, his costs of the suit of *Hele* v. *Fernie*, they had committed a breach of trust. The bill prayed that the trusts of the deed of the 9th of November, 1839, might be performed under the direction of the Court; and that Gibbon and Western might be made answerable in respect of the trust money under that deed; and that the plaintiff's costs, thereby provided to be paid, might be paid to him.

Lady Glamis put in a general demurrer.

[*588] *Mr. *Wigram* and Mr. *Lovat*, in support of the demurrer: A person who is not a party to a contract, cannot enforce it. Consequently, the bill cannot be maintained; for the plaintiff seeks, by it, to obtain the benefit of a deed to which he is not a party. If A. contracts with B. to pay money to C., without consideration, it has been decided that C. cannot compel A. to pay the money. It is true that the bill alleges that the 4,000*l.* has been received and in part applied, by the trustees, pursuant to the directions in the deed. Those circumstances,

however, have been relied on, in other cases, and have been held to be insufficient to entitle a person not a party to a deed, to enforce it. *Garrard* v. *Lord Lauderdale*;(a) *Walwyn* v. *Coutts*.(b) It is impossible for any case to be more decisive upon the point than *Garrard* v. *Lord Lauderdale*. There the solicitor of the defendants and of the Duke of York, wrote a letter to the plaintiff, informing him that the Duke had made an assignment of his crops and other effects at Oatlands, to the defendants, for the benefit of the plaintiff and the other creditors whose names were contained in the schedule to the deed. In the present case, the letters which the defendants and their solicitors wrote to the plaintiff, were of a totally different character; they were, in fact, a repudiation of the plaintiff's claim. The deed was made, not for the purpose of creating a trust in favor of the plaintiff, but for the purpose of carrying into effect an arrangement which the parties to it had made for their own benefit. *Acton* v. *Woodgate*;(c) *Bill* v. *Cureton*;(d) *Ex parte Pye*.(e)

*Mr. *Lovat* said that the subject of the deed, in this [*589] case, was a chose in action; that an assignment of a chose in action carried nothing with it at law; that it was nothing more than a contract; and that there was no case in which it had been held that a trust could be created, as to a chose in action, of which a person not a party to the deed, could claim the benefit.

Mr. *Knight Bruce* and Mr. *E. Montagu* appeared in support of the bill; but,

THE VICE-CHANCELLOR, without hearing them, said: I think that this demurrer ought to be overruled. The case is extremely different from *Walwyn* v. *Coutts*, *Garrard* v. *Lord Lauderdale*, and the other cases referred to.

In the first place, though, at the time when the deed was ex-

(a) Ante, Vol. III. p. 1.
( ) Ibid. 14; and 3 Mer. 707.
(c) 2 Myl. & Keen, 492.
(d) Ibid. 503; see 510 and 511.
(e) 18 Ves. 140.

ecuted, it might be said that the subject of the assignment was a chose in action; yet the character of that subject has been since altered; because the bill states that a considerable part of the 4,000*l.* has been received by the trustees, and to an amount more than sufficient to pay the costs intended to be provided for by the deed. Then it is to be observed that the deed was prepared under the following circumstances. A bill had been filed by Mr. Hele, against Mr. Fernie and others; and the plaintiff expressly states, upon his bill, that he was made a formal party to that suit; and that he had no interest in the 4,000*l.*: so that he states that he was a party of such a nature that, as a matter of course, he would be entitled, either sooner or later, to have his costs paid by the plaintiff Hele, in the first instance, by

[*590] whomsoever they might be ultimately *borne. Then the parties to the indenture came to a compromise, amongst themselves, on the following terms, namely, that the 4,000*l.* should be received by the trustees, and that, in the first place, the parties to the deed should be paid their costs of Hele's suit and of the indenture; that the plaintiff should be paid his costs of the same suit; that 800*l.* should be paid to Mr. Hibbert; 1,800*l.* to Mr. Hele, and the residue of the 4,000*l.* to Lady Glamis: so that, by the frame of the deed, Lady Glamis has no interest whatever in the 4,000*l.*, except that she has a right to the surplus which shall remain after payment of the costs and sums of money before mentioned.

Now it is quite plain that Hele's executors have an interest in having the trusts of the indenture performed; because there is plainly a liability upon them to pay the costs incurred by the plaintiff, in the suit of *Hele* v. *Fernie*.

This then is not like a case where a party has made, of his own accord, a provision for payment of his creditors and then chooses not to be bound by his own voluntary act: for there are other parties interested. Lady Glamis has not the sole voice in the matter; but Mr. Hele's executors have an interest in it. Indeed it is stated, on the face of the bill, that all the defendants to the suit claim an interest in the performance of the trusts of the indenture; and the interest which Hele's executors claim is, in

part, that there shall be a performance of the trust for payment of the costs of the suit of *Hele* v. *Fernie*.

I think, therefore, that the plaintiff has a sufficient interest to sustain the bill.

Demurrer overruled.

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*Lady Glamis appealed to the Lord Chancellor. The [*591] appeal was argued in April, 1841; and, on the 28th of that month, his Lordship reversed the Vice-Chancellor's decision.

His Lordship, in the course of his judgment, said that the plaintiff stated, expressly, in his bill, that he had no interest in the 4,000*l.* or any of the matters in question in the suit which had been instituted by Mr. Hele, and that he was merely a formal, if not an unnecessary party to that suit; that, that suit having been compromised, Hele was, of course, liable to pay, to the plaintiff, his costs of it; and, in order to protect him against the consequences of that liability, the parties who were interested in the fund in dispute, provided, incidentally, that the plaintiff's costs should be paid out of the fund: that the question then was whether that provision gave the party, whose costs were so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund, not having been a party to the arrangement, and the arrangement having been made between the parties interested in the fund, for their own benefit or convenience: that the present case was not distinguishable from *Garrard* v. *Lord Lauderdale* and the other cases which had been cited, in each of which the plaintiff was as much a *cestui que trust* as the plaintiff in the present case was. His Lordship added that the objection was one which was open to all the defendants; and, of course, it was immaterial what interest the party who made the objection, had.

[*592] *THE ATTORNEY-GENERAL *v.* SHORE.

1843: 14th, 15th, and 16th February and 9th May.

In 1704, Lady Hewley, a Protestant Non-conformist, conveyed estates to trustees for the benefit of such poor and godly preachers for the time being of Christ's Holy Gospel, and for such poor and godly widows for the time being, of poor and godly preachers of Christ's Holy Gospel, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel, in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should approve and think fit; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit. At the date of the deed, all religious sects tolerated by law believed in the Trinity, but, in the course of time, the estates became vested in trustees, of whom the majority (though called Presbyterians) were Unitarians, and one was a member of the Church of England: and they applied the rents for the benefit of Unitarians. At the hearing of an information filed against the trustees, the Court held that neither Unitarians nor members of the Church of England were entitled to administer or participate in the benefits of the charity; and ordered the trustees to be removed; and, afterwards appointed members of three different sects of Trinitarian dissenters, in their place, some of whom were Independents, others Presbyterians in connection with the Established Church of Scotland, and the rest Presbyterians in connection with the Secession Church of that country.

BY deeds dated in January, 1704, Lady Hewley, the widow of Sir John Hewley, and a Protestant Non-conformist, conveyed estates in Yorkshire, to Richard Stretton, Nathaniel Gould, Thomas Marriot, John Bridges, Thomas Nesbitt, Doctor Coulton and James Winlow, and their heirs, upon trust that they should, after Lady Hewley's death, pay an annuity, &c., out of the rents, and should, from time to time, out of the residuary rents, as well pay and dispose of such sums of money, yearly or otherwise, to such and so many poor and godly preach-
[*593] ers for the time being of *Christ's Holy Gospel, and to such poor and godly widows, for the time being, of poor and godly preachers of Christ's Holy Gospel, at such time and times, and for so long time or times, and according to such distributions as the said trustees and managers for the time being should think fit, and employ and dispose of such sums of money, and in such manner, for the encouraging

and promoting of the preaching of Christ's Holy Gospel, in such poor places as the trustees and managers for the time being should think fit: as also employ and dispose of such sums of money, yearly or otherwise, as and for exhibitions for such or so long time or times, for or towards educating of such young men designed for the ministry of Christ's Holy Gospel, never exceeding five such young men at one and the same time, as the trustees and managers for the time being should approve and think fit. And, as to the surplus and remainder of the residuary rents, that the trustees should, from time to time, employ and dispose of the same, in and for the relieving of such godly persons in distress, being fit objects of Lady Hewley's and the trustees' and managers' charity, as the trustees and managers for the time being should think fit: provided that the trustees and managers for the time being, should, in their dispositions and distributions of the aforesaid charities, have a primary respect to such objects thereof as aforesaid, as were then, or should afterwards be in York, Yorkshire, or other northern counties in England, not excluding those in other places and counties, as the trustees and managers for the time being, from time to time, should think fit; and also that, whatsoever charitable dispositions or allowances by Lady Hewley should have been made to persons or places in York or Yorkshire immediately or shortly before her death, should be continued and paid out of *the said residuary rents, by the trustees and managers [*594] for the time being, until they should see just reason to discontinue or alter the same. And it was declared that from time to time, as and when any one of the trustees for the time being should die, the survivors of them should elect, in the room of every such deceasing trustee, such a person as they, in their judgments and consciences, should think fit and approve of, who should be a manager of the trust estates, together and equally with the surviving trustees, and have, equally with them the same authority, power, and benefit, respecting the trusts thereby declared; and, in case of the death of any such elected manager, to elect, in the like manner, in his room, another like manager; and that the election of every such manager for the

time being, should be entered and registered in some or one of the books to be provided and kept as therein mentioned; and that, after such time as two or three, at the most, of the trustees should have departed this life, the survivors of them should add to themselves as co-trustees with them, all and every the manager and managers so elected as aforesaid, to make up the number of trustees completely seven in the whole; and the surviving trustees were thereupon, by the advice of the counsel, to convey the trust estates to the persons who, for the time being, should be such elected managers, and to the surviving trustees, so as to complete the number of seven trustees: and Lady Hewley reserved to herself power to revoke, by deed or will, the uses and trusts thereby declared, and to declare new uses or trusts of the estates.

By deeds, dated in April, 1707, Lady Hewley conveyed, to the same persons as were trustees of the deeds of January, 1704, a new erected house, messuage or building, used for a hos-
[*595] pital or almshouse for poor *people, together with other hereditaments in the city and county of York, upon trust (after her death,) to permit the almshouse or hospital to be, for ever, used and enjoyed as a hospital or habitation for poor people, in such manner as the same then was, or, at the time of her death, should be used or enjoyed, but subject to such orders, regulations, powers, provisoes, and appointments as were thereinafter referred to: and upon trust, (after the death of Lady Hewley) that the trustees and managers for the time being, should, out of the rents of the residue of the premises, defray the expense of repairing the premises, of providing catechisms for the inmates of the hospital for the time being, and certain other charges; and, upon trust that the trustees and managers for the time being should, out of the rents of the residue of the premises, raise, yearly for ever, the sum of 60*l.*, for the maintenance of such poor people as Lady Hewley, during her life, had or should place, or which the trustees and managers for the time being should, from time to time, place in the hospital, in such proportions, at such times, and to such uses and purposes as Lady Hewley had, or, at any time during her life, should appoint in

writing under hand, or in any book or collection of rules or orders, which then were, or thereafter should be made, by Lady Hewley, for the better ordering, choosing, and government of the poor in the almshouse; and more particularly that the trustees and managers for the time being should, from time to time after the death of Lady Hewley, fill up and place to the number of ten poor persons, qualified according to such collection of rules and orders, in such hospital or almshouse, whereof nine were to be always poor widows or unmarried women, so long as they should continue such, being of the age of 50 years or upwards, and the tenth person to be a sober, discreet, and pious poor *man, who may be fit to pray daily twice a [*596] day, (viz. every morning and evening,) with the rest of the poor in the almshouse, if such a man could conveniently be found; and, in default thereof, the tenth to be a poor woman, qualified as the other nine; and also that the trustees and managers for the time being should pay, to each of the said ten poor persons, 10*s.* upon the first day of every month. And upon further trust that, from time to time, as and when any one of the trustees for the time being should die, Lady Hewley, during her life, and after her death, and in default of her nomination and election, the survivors of the trustees should elect, in the room of every such deceasing trustee, such person of reputation as they, in their judgments and consciences, should think fit, who should be a manager of the trust estates, together and equally with them, and should have the same authority and powers respecting the trusts thereby declared: and upon further trust, that they, the trustees and managers for the time being, should, at all times after the death of Lady Hewley, observe the rules, orders, and directions and trusts therein and in the book of rules, orders and directions, subscribed by Lady Hewley, contained; and that the trustees and managers for the time being should, after the death of Lady Hewley, be the only special visitors and governors of the almshouse or hospital, and of all the poor persons therein, and that they should have the sole power, from time to time, to govern, order, admit into, or expel from the almshouse, all such poor persons as then were, or thereafter

should be admitted into the same; yet pursuant always to the rules, orders, &c., in the said book contained. And upon further trust that, if any of the trustees should be interrupted or disturbed in their visitation, rule or government of the almshouse, or of the poor people therein, by or by reason of any [*597] civil *or ecclesiastical or other lawful power or authority whatsoever, then and so long as such disturbance or interruption should continue, the trustees and managers should employ the 60*l.* to such other pious uses as Lady Hewley should appoint, by any writing signed by her in the presence of three or more witnesses, and, in default of such appointment, then to employ the same to such or the like charitable uses as were thereinafter expressed. The residuary rents were then directed to be applied upon trusts which were a repetition of the trusts of the deeds of January, 1704.

Lady Hewley, by a writing under her hand dated the 10th day of May, 1709, declared that the management of the hospital as to the putting in the poor upon any vacancy, should be in the power of Doctor Coulton, and also of T. Hodgson, Matthew Baycock, gentleman, Samuel Smith, Robert Rhodes, Martin Hotham, mercer, and William Hotham, and such as should be chosen to succeed any of them when they should die. The rules left by Lady Hewley, and referred to by the last-mentioned trust deed, were entituled: "A collection or book of rules, orders, and directions to be kept and observed as well by the feofees or trustees of the revenues of the newly erected hospital, almshouse, or habitation for ten poor people, built and settled upon them by dame Sarah Hewley, of the city of York, widow, for the better government and ordering of the same, as also by the said poor persons placed or to be placed in the same." The following were among the rules left by Lady Hewley and referred to in the deed of April, 1707: "Let none of evil fame or report be admitted into the hospital, but such as are poor and piously disposed, and of the Protestant religion. Let every almsbody be one that can repeat, by heart, the Lord's Prayer, the [*598] Creed and Ten Commandments, *and Mr. Edward Bowle's Catechism. Let all the almspeople, when not dis-

abled by weakness, duly repair to some religious assembly of the Protestant religion, every Lord's day, forenoon and afternoon, and at other opportunities, to attend the ordinances of God."

It was alledged, and, at the hearing of the cause, evidence was received that Lady Hewley and all the original trustees of the estates whose religious opinions could be ascertained, believed in the doctrine of the Trinity, the Atonement and original sin. In the course of time, however, the estates became vested in trustees, the majority of whom, though calling themselves Presbyterians, professed Unitarian opinions; and a considerable portion of the rents had been, for some years, applied by them towards supporting a seminary for the education of Unitarian ministers, and for the benefit of poor preachers and other persons of that denomination. In consequence of which the information was filed, at the relation of certain members of the sect called Independents (which sect still professed the doctrines above mentioned) against the trustees and other persons having the management of the charities, praying, (amongst other things,) for a declaration that ministers or preachers of Unitarian belief and doctrine, and their widows and members of their congregations, or persons of Unitarian belief and doctrine, were not fit objects of Lady Hewley's charity; that exhibitions to any college or school where Unitarian belief or doctrine was taught or inculcated, were not fit exhibitions for promoting the educating of ministers of Christ's Holy Gospel, within the intent and meaning of Lady Hewley's charities: that the allowance of 80*l.* which had been made to the defendant, Mr. Wellbeloved, as the preacher of St. Saviour's Gate Chapel (in York,) was an unfit allowance or distribution of the charity funds, by reason *of his not being a godly preacher of [*599] Christ's Holy Gospel, within the intent and meaning of Lady Hewley's charity, and by reason of Unitarian belief and doctrine being preached and inculcated in that chapel, and that such allowance might be wholly discontinued in future; and that all the objects of Lady Hewley's charities might be decreed, fairly and in such manner, to participate, in the charity funds, as she meant and intended; and, in particular, that a fair and

just proportion thereof might be distributed to and amongst poor godly widows of poor and godly preachers of Christ's Holy Gospel; and that a fair and just proportion thereof might be applied for the encouraging and preaching of Christ's Holy Gospel in poor places; and that the rules relating to the almshouse, might be enforced; and that it might be declared that such dissenters alone as were commonly called Orthodox Dissenters, and as would have been within the protection of the Act of Toleration of the 1st of William and Mary,(*a*) at the time of the foundation of the charities, and would not have been subject to the penalties of the 9th and 10th of Will. 3,(*b*) against blasphemy, could be considered as coming within the intent and meaning of Lady Hewley, and as entitled to participate in the benefit of her charities, and that the defendants, the then trustees and managers of the charities, or such of them as the Court should think fit, might be removed, and that other trustees and managers might be appointed in their place.

The cause was heard before the Vice-Chancellor in December, 1833; and, on the 23d of that month, his Honor declared that ministers or preachers of Unitarian belief and doctrine [*600] and their widows and members of *their congregations and persons of that belief and doctrine, were not fit objects of and were not entitled to the benefit of the charities; and it was ordered that the defendants should be removed from being trustees and managers of the charities, and that the Master should appoint proper persons in their place, and approve of a scheme for the future application of the charity funds, having regard to the above declaration.

On the 5th of February, 1836, Lord Lyndhurst, assisted by Mr. Justice Patteson and Mr. Baron Alderson, affirmed the above decree.(*c*)

Two petitions were, afterwards, presented by persons not parties to the cause; one by the Rev. John Park and others, on

(*a*) C. 18. (*b*) C. 32.

(*c*) See ante, Vol. VII. p. 309, note. A full report of the judgments referred to above, will be found in a work intituled "Lady Hewley's Charities," which was kindly lent to the reporter by one of the solicitors engaged in the cause.

behalf of the whole body of orthodox Presbyterian congregations composing the presbytery of the north-west of England; the other, by the Rev. Henry Thomson and others, on behalf of the united Presbyterians of Lancashire, Newcastle and Carlisle, who also were described as orthodox Presbyterian dissenters. The congregations on whose behalf the first petition was presented, were in connection with the Established Church of Scotland, and the congregations on whose behalf the second was presented, were in connection with the Secession Church of that country. Each petition stated that the Relators were prosecuting the decree in the Master's office; but that, as the Master had refused permission, to the defendants, to attend the proceedings before him, such proceedings would be conducted by the Relators only; that the *Relators were dissenters, belonging [*601] to the religious sect called Independents; that Lady Hewley was not a member of that sect, but was a Presbyterian, and was warmly attached to the leading peculiarities of internal polity and discipline by which Presbyterianism had been always distinguished from Independency; that the petitioners differed, from the Church of England, in points of discipline only, and were known by the name of Orthodox Dissenters; that the congregations represented by the petitioners were, as the petitioners submitted, entitled to be represented in the new trust, many of such congregations having, theretofore, participated in the funds of the charity; that the petitioners conceived that Lady Hewley, in making the charitable dispositions mentioned, had particularly in view the interest of the Presbyterians in the northern counties of England; and that the petitioners were desirous that, in the appointment of trustees and the approval of a scheme and the other proceedings to be had in pursuance of the decree, due provision should be made for representing and protecting the interests of such Presbyterians, and that, for that purpose, a due proportion of the trustees and managers should be selected from among dissenters of the Presbyterian denomination, and that, in such selection, some Scotch Presbyterian clergyman resident in England, should be included. The petitioners prayed that they might be permitted to take part in the proceedings before the

Master, and to propose a scheme and submit the names of persons as trustees for the approval of the Master.

The petitions were heard before Lord Cottenham, C., in March, 1836; and, on the 16th of that month, his Lordship ordered that the petitioners respectively, should be at liberty to go in [*602] before the Master, and *watch the proceedings under the decree, and to propose proper persons as trustees and sub-trustees or managers of the charities and estates; and that the Master should proceed upon such proposals accordingly.(a) And his Lordship reserved the consideration of the costs of the applications and of the proceedings to be thereupon had, until after the Master should have made his report, upon the understanding that there was, in no event, to be more than one bill of costs, as if one petition only had been presented and as if one solicitor only for both petitions attended the Master.

In August, 1836, the defendants appealed from Lord Lyndhurst's judgment, to the House of Lords. The appeal was argued in May and June, 1839. In August following, the House, after taking the opinion of seven learned judges of the Courts of Common Law, upon six questions,(b) dismissed the appeal.

On the 16th of December, 1837, the Master made his report in pursuance of the decree; and thereby certified that he approved of seven gentlemen, named in the report, as trustees of the charity estates; and of seven others, who also were named, as sub-trustees or managers of the charity estates. All those gentlemen were resident in England: four of them were members of a Presbyterian congregation in connection with the Established Church of Scotland; four others were members of a Presbyterian congregation in connection with the Secession Church of Scotland; and the rest were Independents.

Four petitions were presented, at different times, after the Master had made his report; two by the relators, [*603] *in the name of the Attorney-general; one of which prayed that the Master's report might be reviewed, and the other, that Lord Cottenham's order of the 16th March, 1836,

(a) See 1 Myl. & Cr. 394.

(b) See post, p. 615.

might be varied or discharged. The other two petitions were presented by the parties who had obtained the last-mentioned order, and prayed that the report might be confirmed. Those four petitions came on to be heard before the Vice-Chancellor, the Lord Chancellor having directed that the one which sought to vary or discharge Lord Cottenham's order, should be heard by his Honor.

Mr. *Bethell*, Mr. *Anderdon* and Mr. *Romilly* appeared in support of the petitions presented by the relators in the name of the Attorney-general.

Mr. *Twiss* and Mr. *Wray* appeared for the Attorney-general distinct from the relators, in order to protect the interests of the charity, generally.

Sir *Charles Wetherell* and Mr. *Lloyd*, and Mr. *Swanston* and Mr. *Malins* supported the petitions for confirming the Master's report.

On the 9th of May, 1843, the Vice-Chancellor delivered the following judgment, from which the grounds on which the relators opposed the confirmation of the report, will appear.

THE VICE-CHANCELLOR(*a*):—In this case the Attorney-general, at the relation of Samuel Shore, the younger, and others, by amended information, stated that, during the times of the religious persecutions of the English Presbyterians and Independents and other persons calling themselves godly dissenters from the Established Church, in the time of Charles the Second, Dame Sarah Hewley stood forward as the protector and supporter, in Yorkshire, of the ejected ministers of St. Bartholomew's Day in 1662, and of the persons calling themselves "godly," who were non-conformists, and who were subjected to pains and penalties, in those days, for their forms of religious worship: that, by her trust deed of 1704, it was de- [*604]

(*a*) His Honor delivered a written judgment, of which the above is a copy.

clared that the trustees and managers should, in their dispositions and distributions of the charity, have a primary regard to such objects thereof as were then, or should afterwards be in York, Yorkshire, or other northern counties in England, not excluding those in other places and counties; that, in the hospital deed of 1707, she directed the surplus rents of the estates comprised in that deed, to be distributed and disposed of to poor godly preachers and their widows: that, up to the day of her death, Lady Hewley continued to be satisfied with the persons whom she had appointed to be trustees of her charities; and that Richard Stretton, the trustee first named, was a non-conformist. The information also stated that Dr. Coulton, the original preacher at St. Saviour's Gate Chapel, in York, whose ministry Lady Hewley attended, and who was her friend and spiritual adviser, and the sole executor of her will, is named as another of her original trustees; and that the Rev. Mr. Hodgson, who is named as a manager of the hospital, was one of the attesting witnesses to Sir John Hewley's will, and the private chaplain of Lady Hewley. The information further stated, that Lady Hewley died on the 3d of August, 1710: that the dissenters from the Established Church within the protection of the Act of Toleration of William and Mary at the time of the foundation of these charities, and for whose sole benefit these charities were originally intended and applied, who are now commonly called Orthodox

[*605] *Dissenters, are, therefore, desirous to have a judicial declaration as to the proper mode of administering and disposing of these charities: that application had been made to the then present trustees, to apply the funds for the sole benefit and advantage of the dissenters from the Established Church who are now commonly called Orthodox Dissenters, giving a preference to York, Yorkshire, and other northern counties: that the great body of dissenters distinguished in those times by the names of Presbyterians, Independents and Baptists, differed among themselves solely on questions or articles of church government, and as to its divine origin and power, and as to forms and ceremonies; and that, upon articles of faith and the

object of religious adoration or worship, they were all agreed among themselves and with the Established Church.

One part of the prayer was that it might be declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of Dame Sarah Hewley's charities. That part of the prayer, therefore, asked for an exclusive declaration. Another part of the prayer, was that it might be declared that such dissenters alone as are now commonly called Orthodox Dissenters, can now be considered as coming within the intent and meaning of Lady Hewley, and as entitled to participate in the benefit of her charities. That part of the prayer, therefore, asked for an inclusive declaration.

It appears, from the full report of the proceedings in the House of Lords,(*a*) that Dr. John Pye Smith, a witness *for the Relators, deposed that he had no doubt and did [*606] verily believe that Lady Hewley, Dr. Coulton, Mr. Hotham and Richard Stretton, were Trinitarians, and reputed to be dissenters: that he could not affirm of what denomination they were; but, as a matter of probability, he had no doubt that they were of the Presbyterian or of the Congregational denomination; that the ordinary sense and meaning of the term Presbyterians or Presbyterian dissenters, at or about the time of the foundation of Lady Hewley's charities, was a particular class of separatists from the Establishment, who differed from the two other classes on certain points of external discipline.

The Rev. Thomas Scales, for the relators, deposed that he believed that Lady Hewley, Mr. Bowles, Dr. Coulton, the Rev. Mr. Hotham, Richard Stretton, Nathaniel Gould, Timothy Hodgson, Martin Hotham, and William Hotham, were all dissenters, and that he believed that Timothy Hodgson, the Rev. Mr. Hotham, and Nathaniel Gould, were of the congregational class, and that the rest were of the class called Presbyterians. Dr. Bennett also deposed, that the word or term Presbyterian, at the

(*a*) In a work intituled "Lady Hewley's Charities," mentioned ante, p. 600, note.

time referred to, was commonly used as the name or description of a class or denomination of English Protestant dissenters, and, that they were so large and influential a body as to give a name to all dissenters.(*a*)

The statements in the information and the evidence that I have noticed, all seem as if made for the direct purpose of [*607] procuring an inclusive declaration in the *decree, according to that part of the prayer which I have secondly mentioned, that is, a declaration who were entitled, and not merely a declaration who were not. But it is to be observed that the decree of the 23d December, 1833, (The Vice-Chancellor's decree,) merely declared that Unitarians were not fit objects of Lady Hewley's charity, and ordered that the defendant John P. Heywood and all the other defendants, including Mr. Palmes, who was a member of the Church of England, should be removed from being trustees or sub-trustees and managers of the charities; and that it should be referred to the Master to appoint proper persons to be trustees and sub-trustees or managers thereof, in the room of the defendants, and to approve of a proper scheme for the application of the funds therein mentioned; and reserved the consideration of all further directions until after the Master should have made his report.

My impression, which is confirmed by the recollection of his Honor, Vice-Chancellor Knight Bruce, who was second counsel for the relators, is that the declaration was framed in that exclusive form, because the present Lord-Chancellor of Ireland, who led for the relators, desired that it should be so, and that it should not be made co-extensive with the prayer, which asked, not only an exclusive but an inclusive declaration. However, the removal of all the defendants from the trusteeship, coupled with the exclusive declaration, showed, with reasonable clearness, what the principle of the decree was, namely, that not merely unorthodox dissenters, but also members of the Church of England, should be excluded. It went no further; but en-

(*a*) These witnesses deposed to the above facts from "tradition and authentic publications;" and gave *their opinions*, derived from the same sources as to the meaning, in 1704 and 1707, of "poor godly preachers," &c. &c.

tirely left open the question who should be included; which question can only be determined either by a decree upon *further directions in this suit, or by a decree in some other suit. [*608] The decree was brought, by appeal, before Lord Lyndhurst, and, on the fifth of February, 1836, it was affirmed by his Lordship in accordance with the joint opinion of Mr. Baron Alderson and Mr. Justice Patteson. It seems, on referring to the printed account of their judgments, that they came to the conclusion that the exclusive declaration in the decree, and the removal of a churchman as well as Unitarians from the trusteeship, was right; because none could be included as partakers of the charity except orthodox dissenters; and Lord Lyndhurst was satisfied, on the evidence, that, in her religious faith and opinions, Lady Hewley was a Presbyterian.

On the 6th of March, 1836, upon the petition of Mr. Park and others, ministers of the presbytery of the north-west of England, and the petition of Mr. Thomson and others, ministers of congregations of Presbyterians at Carlisle and other places, Lord Cottenham, then Lord-Chancellor, ordered that the petitioners, respectively, should be at liberty to go in, before the Master, and watch the proceedings, and propose proper persons as trustees and sub-trustees or managers of the charities and estates in the petitions mentioned; and reserved the consideration of the costs.

The order, as far as it goes, seems to indicate that Lord Cottenham thought that orthodox English Presbyterians might be partakers of Lady Hewley's charities, or, at least, shows that his Lordship did not think that they could not partake; and, if we look out of the dry terms of the order, to the very words used by his Lordship as they appear in Mr. Sutton Sharpe's note, no doubt can be entertained of what his Lordship thought. *The words were, "something must be done, otherwise this will be an independent charity; which was not the meaning of the decree." [*609]

On the 16th of December, 1837, Lord Henley, the Master, made his report in pursuance of the decree. Then followed the appeal to the House of Lords, for the purpose of deciding whether Lord Lyndhurst was right. The House directed six ques-

tions to be put to the learned Judges. The second was, what description of ministers, congregations and poor persons are proper objects of the trusts of the deeds of 1704 and 1707?(*a*)

Seven of the learned Judges gave their answers to the House. One of them thought that Unitarians were included. Another thought that members of the Church of England, were included. Six thought that Unitarians were to be excluded. But, with those exceptions, all agreed; for all seven thought all orthodox dissenters were to be included. And, on the 5th of August, 1842, the House of Lords affirmed Lord Lyndhurst's decree and the decree of December, 1833; Lord Brougham being present, who had partly heard the appeal from the decree of December, 1833, and who, according to the written report, concurred in what was said by Lord Cottenham, who proposed to dismiss the appeal with costs.

Lord Cottenham's observatins, upon moving the judgment of affirmance in the House of Lords,(*b*) are most important: his Lordship says: "The intention of Lady Hewley could [*610] *only be judged of by the language and terms used in the deeds." If that is the law, no evidence of her feelings and preferences can be regarded.

I consider that, from the proceedings in this cause, it is to be collected that nine Judges of the common law, the present Lord Chancellor and the two late Lord Chancellors, Lord Brougham and Lord Cottenham, and the House of Lords, were of opinion that English orthodox dissenters may participate in the benefits of Lady Hewley's charities.

But, whether it be their opinion or not, it remains to be decided, by decree, who are the persons that shall participate; and, before that question has been determined, and while this cause is in such a state that it cannot be determined, the Court is, in effect, by the petition supported by the Relators, of the 20th of December, 1837, asked to determine it.

(*a*) The questions, and extracts from the answers to them, are inserted post, 615, *et seq.* The answers to the first question seem to comprise nearly the whole of the law relating to the admissibility of extrinsic evidence.

(*b*) See post, 639.

That petition asks that the Master's report may be reviewed. It was originally the petition of the Relators only; but, by an order of the 17th December, 1842, it was amended, so as to become the petition of the Attorney-General at the relation aforesaid. The parties who petitioned Lord Cottenham in March, 1836, also presented petitions praying that the report might be confirmed. Another petition was presented on the 17th of December, 1842, in the name of the Attorney-General at the relation aforesaid, praying that the order of the 16th of March, 1836, might be discharged or varied by adding thereto: "that such order is without prejudice to any question which may arise on the Master's report under the same, or otherwise in any proceeding in the cause; and that, for the purpose aforesaid, all necessary directions may be given."

*Upon the hearing of these four petitions, the counsel [*611] for the Crown(*a*) appeared and insisted that the Master's finding was right, and that the order of the 16th of March, 1836, ought not to be discharged. It appeared, in the course of the discussion, that the order of the 16th of March, 1836, (Lord Cottenham's order,) though it is not in form expressly said to be made by the consent of the counsel for the Crown, yet, in fact, was virtually so made; and it was agreed, by all the counsel for the Crown, the Relators and the other petitioners, that any order which I should make, on the petitions, for or against the report, should be prefaced with this statement, which I wrote out with my own hand: "The counsel for the Crown desiring that the Attorney-General's petition in this cause, should be heard upon the merits stated in it, in the same manner as if the order of the 16th of March, 1836, had been made upon the Attorney-General's consenting that the petitioners named in that order should be at liberty to go in before the Master, without admitting their right so to do." It appears to me, therefore, that the order of the 16th of March, 1836, cannot be set aside for want of form.

The Master has approved of Joshua Wilson, esq., of Highbury Place, Middlesex, and a member of the Inner Temple, John Clap-

(*c*) Mr. Twiss and Mr. Wray.

ham, of Leeds, esq., Joseph Hodgson, of Woodlands, near Halifax, esq., Thomas Lonsdale, of the city of Carlisle, esq., Robert Barbour, of Manchester, esq., James Finlay, of Newcastle-upon-Tyne, esq., and James Ross, of the city of Carlisle, esq., to be trustees: and of the Rev. James Parsons, of the city of York, a member of the congregational church there, Mr. James Pigot Pritchett, of the city of York, architect and surveyor, James Bowden, of Kingston-upon-Hull, merchant, the [*612] Rev. Hugh Ralph, of Liverpool, *LL. D., the Rev. Charles Thomson, of the borough of Tynemouth, North Shields, Mr. Thomas Fair, of Frenchfield, in Cumberland, gentleman, and the Rev. James Pringle, of Clavering Place Chapel, in Newcastle aforesaid, to be sub-trustees or managers.

The questions upon the four petitions were argued at great length, and with great ability. But it struck me, at the time, that the real question before the Court, namely, whether proper persons had been named as trustees and managers, was, in a great degree, overlooked and confounded with another, namely, who are the persons entitled to participate in the benefit of the trusts? And I therefore thought it right, before I decided the real question, to read over the pleadings and orders made in the cause, as well as the various historical and other authorities referred to by the Relators' counsel, and supplied by the Relators, and all the affidavits. And, having done so, I am of opinion that the Master's report is right, and ought to be confirmed: and, for this reason most especially, that, unless it is confirmed, I do not see how the question, who shall participate in the charities, can be decided. If the report be confirmed and the trustees disagree, then it will be competent, to the Relators, to bring the new trustees before the Court, as defendants in this or some other suit, and have the questions raised on the affidavits, decided. But, as the cause stands at present, the former trustees, who are the only defendants, have no interest in raising any question.

As both sets of petitioners under Lord Cottenham's order, ask to have the report confirmed, it is useless to consider the objec-

tions which, in the affidavits, they have made to each other, or which they have made to the Relators.

*The Relators object to Messrs. Ross and Finlay being [*613] appointed trustees, and to Messrs. Fair and Pringle being appointed sub-trustees or managers, because they, as the relators state, are members of the Secession Church of Scotland; and to Messrs. Lonsdale and Barbour being appointed trustees, and to Messrs. Ralph and Thomson being appointed sub-trustees, or managers, because they, as the relators also state, are members of the Church of Scotland. Suppose they are; the decree has not said that they ought not to be trustees, though it has, in effect, said a Unitarian dissenter or a Church of England man, ought not to be a trustee. But, upon the affidavits, I do not understand that Messrs. Ross and others are members of the Secession Church of Scotland; or that Messrs. Lonsdale and others are members of the Established Church of Scotland.

It is clear, upon the affidavits, that, in Lady Hewley's lifetime, there were congregations of Presbyterians in many places in the northern counties; for instance, Whitehaven, Tynemouth, Alnwick, Long Cramlington, Lewick Etal, Morpeth, Penrith, Great Salkeld, Plumbton, Penruddock and Carlisle; and, from them, have sprung up Presbyterians, some of whom are in amity with the Established Church of Scotland, and some with the Secession Church or the Relief Church. In some of the congregations, there are some natives of Scotland, but they are few in proportion. Some of those congregations consist, wholly, of natives of England. English Presbyterians do not cease to be English Presbyterians, merely because they are in amity with the Established Church of Scotland or with the Secession or Relief Church. Presbyterians, in the north of England, of congregations of both kinds, that is, in amity with the Secession Church and the Established *Church of Scotland, have actually [*614] participated in the benefit of Lady Hewely's charities.

Of the orthodoxy of both sets of Presbyterians, there is no doubt. There are many passages in the affidavits, from which it appears that they hold the Westminster Confession, which substantially agrees with the Articles of the Church of England.

And I see no reason why gentlemen belonging to those congregations, or the ministers of them, though Scotch by birth, yet residents in England, should not be trustees.

Objections made in respect of distance from York, or of being engaged in business, apply to the relators' trustees as well as to the others, and have nothing substantial in them.

The relators object that the report makes two out of each set of Presbyterians, trustees, and only three from the Independents. I do not see how the Master could well have done otherwise. The number seven could not be divided in proportion to the numbers of churches of the different parties, or to the numbers of individuals composing their churches. If four Independents were appointed, they would have a majority of the whole number. The numbers adopted give a preponderance to the larger body, over each of the others, but not an absolute majority of the whole; and, in that respect I think the Master right.

The real objection, so strongly urged by the relators against the other petitioners, namely, that persons such as modern Independents are the only persons that Lady Hewley intended to participate in her charity, cannot, in my opinion, be decided upon these petitions. But it is very fit that there should be some persons before the Court, likely to argue the question fairly with the relators, *which must be judicially decided upon the words of Lady Hewley's deeds, and not by conjectures as to her private opinions.

[*615]

What Lady Hewley personally or privately did feel or think, or what, if she were now alive, she would feel or think upon the questions discussed before me, it may be difficult to say. But, considering her piety and benevolence, it is probable that she, though an English Presbyterian, would have approved of the exertions which the Established Church of Scotland, more rigidly presbyterian, has recently made in favor of the Jews, and would have been delighted to ponder upon the details of that interesting narrative which has lately been published by Messrs. Bonar & McCheyne, two of the missionaries from that church.

With respect to the petitions of Park and others, and Thomson and others, and the amended petition of the Attorney-general,

the order must be to confirm the report, and to give all parties their costs out of the estate; Messrs. Park and others, and Thomson and others, having but one set of costs, according to Lord Cottenham's order. As to the petition of 17th December, 1842, no order is to be made upon it, except to give all parties their costs out of the estate in the same manner. One order may be made upon all four petitions, but it must be prefaced with the statement that I have mentioned.

The following are the questions which are stated (*ante*, page 609,) to have been propounded to the learned Judges, by the House of Lords.

First—Whether the extrinsic evidence adduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled, under the terms "Godly Preachers of Christ's Holy Gospel," "Godly Persons," and the *other [*616] descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady Hewley's bounty?

Secondly—If such evidence be admissible, what description of ministers, congregations and poor persons, are proper objects of the trusts of those deeds respectively?

Thirdly—Whether, in putting a construction upon the deed of 1704, any and which of the provisions of the deed of 1707, may be referred to?

Fourthly—Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed?

Fifthly—The same question as to the deed of 1707? And,

Sixthly—Whether such ministers, preachers, widows and persons are, in the present state of the law, incapable of partaking of such charities, or any and which of them?

1842: 10th May.

Opinions delivered, by the Judges, to the House of Lords, as to the admissibility of extrinsic evidence, for the purpose of determining who were entitled to the benefit of a charity founded, by Lady Hewley, in 1704, for the benefit of "poor and godly preachers, for the time being, of Christ's Holy Gospel," "godly persons in distress, being fit objects of the foundress's and the trustees' bounty, &c.;" and as to who were the proper objects of the charity, supposing the evi-

dence to be admissible; whether Unitarians were excluded, and whether a deed of 1707, between the same parties, and containing the same and other charitable purposes, could be referred to for the purpose of construing the deed of 1704.

All the learned Judges answered the sixth question in the negative.

The following are extracts from their opinions upon the other questions.(*a*)

Mr. Justice *Maule*.—The evidence which is the subject of this (the first) question may be arranged in two classes. First, that offered in order to prove the belief of Lady Hewley with respect to certain points of theology: Secondly, evidence of the opinion of witnesses as to the meaning of certain words; some being words used in the deeds, and some not. I think that none of this evidence is admissible for the purpose mentioned in the question. With respect to the first class: if the most perfect certainty could be obtained with regard to Lady Hewley's belief on the points in question, it ought not to influence the construction to be put on language in which she makes
[*617] *no reference to her opinions or belief. But even if the belief of this lady were the proper subject of evidence, much, if not all, the evidence adduced ought not to be admitted, as not being fit for the purpose of proving it; for example, the extracts from Lady Hewley's will, and from Doctor Coulton's will, and from his funeral sermon.(*a*) The other class of evidence adduced for the purpose mentioned in the first question, is the evidence of the opinions of persons describing themselves as conversant with the history and language of the time when the deeds were executed. If the evidence in question were admissible, it would follow that, in a court of common law, the construction of deeds would be left to the jury; for inferences to be drawn from evidence, are for the jury and not for the the Court. When the meaning of the words of a written instrument in the English language, is the subject of controversy, historical and other works may, with propriety, be referred to in the argument addressed, by the bar, to the Court, as was done largely in the present case. In this way, the Court, judging for

(*a*) The opinions were delivered at considerable length, and occupied thirty-two printed folio pages; but, as they related to difficult and important points, and as there are several other charities similarly circumstanced to Lady Hewley's, (as to some of which suits were about to be instituted,) it was deemed advisable not to omit them. Some pains have been taken to condense their contents faithfully.

(*a*) These wills, and also Sir John Hewley's and Dr. Coulton's sermon, (preached at Lady Hewley's funeral,) contained passages showing that the parties believed in the Trinity, the Atonement, and original sin.

itself of the weight of the authorities cited, is as likely to arrive at a just conclusion as it would be by the assistance of witnesses, though they should respectively depose, each of them, to his own knowledge of history and theology.

As to the second question:—Having, in answer to the first question, stated my opinion that the belief of Lady Hewley is not material, it follows that the supposition of its admission will not, in my opinion, affect the answer to this question. The other class of evidence, the opinion of the witnesses as to the meaning of certain words, being to be rejected, not because it goes to show what is not material, but because it is not a proper mode of proving what is material, might, if its weight and quality were sufficient, have an effect on the construction of the deeds and on the answer to this question: but it wholly fails to lead my mind to any different conclusion from that at which I have arrived by considering the words of the deeds with the assistance of the arguments and authorities furnished in the discussion at the bar.

In my opinion, the ministers, who are proper objects of the trusts of the deeds of 1704, and of the residuary trusts of that of 1707, are those of all sects of Protestant non-conformists tolerated by the law for the time being; that the congregations to be benefited under the trust for promoting the preaching of the Gospel in the deed of 1704, and the residuary trusts in that of 1707, are congregations of the same sects; and the poor persons who are proper objects of the *residuary trust, in [*618] the deed of 1704, "for godly persons in distress," are all poor persons, whatever, belonging to religions of which the worship of the true God is the object; and that the poor women and men who are proper objects of the trusts relating to the almshouse, in the deed of 1707, are Protestant poor persons, whether non-conformists or conforming to the Church of England.

With respect to the ministers and congregations intended, who they are, depends on the meaning of the words, "preachers of the Gospel," and "preaching the Gospel;" and, though those expressions may, in a large sense, comprehend the ministers and services of the Established Church, they are not, according to their common use, both at present and at the date of the deeds in question, to be so understood, but are ordinarily taken to mean Protestant non-conformists. The trust for godly persons in distress being fit objects, &c., seems to be intended to give the trustees, in the administration of so much of the funds as should remain after the special objects had been fulfilled, a discretion to apply it to the relief of all such distressed persons as should appear to them deserving, and to be worshippers of the true God, and not living in wilful neglect or defiance of his laws. The

objects of the trust relating to the almshouse, are so defined by the rules and orders referred to in the deed of 1707, as to leave no doubt on my mind that all Protestants, whether conforming or not to the Established Church, are included.

I do not think the deed can properly be considered as confining the trusts to objects which were lawful at the time of the deed. There is no such restriction expressed, nor is there any ground for implying it: nothing, indeed, to my mind, appears more improbable than an intention that, whatever alterations might take place in the law by increasing or diminishing the amount of toleration, the trusts were to be administered as if the law existing at the time of the deed, had remained unvaried. Such alterations had recently happened, and were likely to happen again; and, if this had been intended, it could easily have been said. It is not said: on the contrary, the repeated expression, "for the time being," seems to point out, expressly, to the trustees that they are to look to what may be lawfully done at the time it is done.

The third question is, &c., &c.—I am of opinion that, in putting a construction on the deed of 1704, none of the provisions of the deed of 1707, may be referred to. If the deed of 1707 referred to or mentioned that of 1704, and contained any declaration of the sense in which Lady Hewley understood the deed of 1704, it would only amount to a declaration of the meaning in which, in 1707, she understood the deed of 1704, and would not, even then, be admissible. But, in fact, the deed of [*619] 1707, does not refer to that of *1704, and, therefore, it could be only admissible on grounds which would admit anything that Lady Hewley said or did at any time after the first deed.

The fourth question is, &c., &c. The fifth is the same question as to the deed of 1707.

I am of opinion that the ministers and preachers, widows, members of congregations and persons mentioned in these questions, are not excluded from being objects of the charities mentioned in the questions. It appears to me that, if such exclusion were intended, it would have been expressed, as it is in the Toleration Act, (1 W. & M. c. 18,) and that the reasons which have been suggested for implying it, wholly fail. These reasons are, principally, that the terms "godly" and "Gospel" were not applied to persons of the sentiments in question; that at the time of the deeds, it was unlawful and liable to penalty to preach such doctrines; and, chiefly, that the Unitarian doctrines are repugnant to the essence of Christianity, and, consequently, that those who hold them could not be comprehended within any charity for christian purposes. But it seem to me, that all those

may be said, and according to the common use of language, are said to preach the Gospel, who profess the name of Christ, and preach a religion avowedly founded on the Scriptures; that "godly" is to be considered as having the sense mentioned in the answer to the second question. The circumstance of the preaching of these doctrines being unlawful at the time of the deed, is, I think, in itself quite immaterial, unless it can be supposed that those who framed the deed, intended that the trustees should be regulated, not by the law for the time being, but by that in force at the time the deeds were executed: a supposition contrary, as it seems to me, to every probability arising from the language of the deeds and the history of the law. With regard to the amount of error of the Unitarian doctrines excluding those who preach and profess them, I cannot think that temporal courts can conveniently entertain the question of more or less of theological error. I think that those who framed the deeds, endeavored, and, on a true construction, successfully endeavored to exclude such an inquiry; my opinion being first, that, according to the use of the words under consideration in the deeds in question, they are not exclusive of any class of Christian, Protestant non-conformists, and that Unitarians are commonly, and always have been considered as forming a part of the Christian community.

Mr. Justice *Erskine*, in answer to the first question, said that no part of the evidence adduced in the cause, was admissible for the purpose mentioned in that question; but that it was *for The House to determine, by reference to history [*620] and to the public writings of known contemporary authors, what was the sense in which the terms to which the question related, were generally used and understood at the date of the deeds of 1707 and 1704.

In answer to the second question, he said that, in his opinion all descriptions of Protestant ministers, congregations and poor persons, whether churchmen or dissenters, were objects of the trusts of the deeds, except those who professed, or (being preachers) purposely or systematically suppressed in their preaching, any doctrines at variance with the doctrines then generally received and understood as fundamental and essential doctrines of the Gospel.

He answered the third question, in the negative. With respect to the fourth and fifth questions, he said that his answer to them had been given, in effect, in his answer to the first and second. He added that the words in the deeds, were not "preachers of Christ's Holy Gospel for the time being," but "preachers for the time being of Christ's Holy Gospel," that is, preachers at the time of their selection as the objects of the

trust: and, as he did not consider that Unitarians were excluded merely by their incapacity at the time, to take the benefit of the trusts; so he did not consider that the removal of their incapacity, brought them within the purview of the deeds.

Mr. Justice *Coleridge*:—It seems to me that the will of Sir John Hewley and Dr. Coulton's funeral sermon, were, in strictness, admissible: not as declarations, by them, either of what Lady Hewley was or they were, but as acts, done by them, showing what they were with whom she lived in most confidence, and her belonging to whose class of religionists may be fairly presumed. I, therefore, answer your lordship's first question by saying that, in my opinion, the extrinsic evidence was admissible for the purpose of determining who are entitled, under the terms stated in that question, to the benefit of Lady Hewley's Charity. Of course, I must be understood as speaking of the evidence in classes, and in its more important details. I do not undertake to say there may not be some unimportant particulars, in the large mass received, that may not fall in with the principles on which I think the general body admissible. I may mention, as instances, such sentences as are to be found here and there in the depositions of witnesses speaking merely of belief, founded on tradition and report, of the Trinitarian opinions of Lady Hewley.

The same learned Judge, in answer to the second, fourth, and fifth questions, said that none but Protestant, Trinitarian dissenters were proper objects of any of the trusts, except
[*621] the *trust for poor godly persons in distress, which, he thought, included members of the established Church and Unitarians as well.

His answer to the third question (which he gave, incidentally, in answering the first,) was, that the deed of 1707 might be referred to, for the purpose of showing that Lady Hewley was one of a large class by whom certain words, used in the deed of 1704, were commonly used in a particular sense, the words, by the hypothesis, being capable of that meaning.

Mr. Justice *Williams* said that the words, "pious and godly preachers of Christ's Holy Gospel," &c., were so general and extensive that they raised a doubt, in his mind, whether Lady Hewley did not use them in a limited sense; and that, therefore, the evidence was admissible in order to show the *status* of Lady Hewley, as to religious opinions, and therefore, to lead to some inference as to the sense in which she employed the indefinite and ambiguous words in the deed of 1704; and that the deed of 1707 might be referred to for the purpose of putting a construction on the deed of 1704; that non-conformist ministers, to whom the description of "godly preachers of Christ's Holy Gospel,"

could be properly applied, and persons of their persuasion, were the proper objects of the trusts of the deeds; and that Unitarians were excluded from being objects of those trusts.

Mr. Baron *Gurney*:—In answering the questions propounded by your Lordships, I will take together the first and second. Although the term "godly" is too plain to be misunderstood, yet the phraseology employed in describing the first and principal object of the founder's bounty, "poor and godly preachers of Christ's Holy Gospel," appears to me not to be, at the present time, in that general use which enables the reader of the deed to ascertain, with precision, the sense and meaning of the founder, except as it may be collected from the state of the law at that time; which is another consideration. If the founder was connected with a religious party by which this phraseology was employed in a certain sense, I think that it is admissible to inquire what was that party, and in what sense they used this phraseology; and, if it can be ascertained in what particular sense the term "godly preachers of Christ's Holy Gospel," was used, that may assist in ascertaining the meaning of the term "godly," in other parts of the deeds. There are parts of these deeds, and of the rules and regulations for the hospital, from which, I think, it may be inferred that Lady Hewley was not a member of the Church of England, and that she did not, by the term "godly preachers of Christ's Holy Gospel," intend clergymen of the Church of England to be the objects of her bounty. The term *"preachers" is not one which is [*622] applied to clergymen of the Church of England. Another provision is for the preaching of Christ's Holy Gospel in such poor places as the trustees shall think fit. The provisions for the alms-people: their qualifications to be nine poor widows or unmarried persons of a certain age, and a tenth person, who is to be a sober, discreet, and pious poor person, who may be fit to pray, daily twice a day, with the rest of the poor in the almshouse, if such a man can conveniently be found.(*a*) There is no direction for any form of prayer; and I think it must be understood to speak of extemporary prayer. The alms-people are to attend some Protestant place of worship, and the alms-people are to be such as can repeat, by heart, the Lord's Prayer, the Creed, the Commandments, and (not the Church Catechism, but) the Catechism of Mr. Edward Bowles, who is admitted, in the answer of Mr. Wellbeloved, to have been a person of note in his day, to have resided at York, and with whom Lady Hewley,

(*a*) This sentence seems to be incomplete; it was, however, correctly copied from the printed answers.

in the early part of her life, had been acquainted. All these provisions combined, appear to me to indicate a foundation, not for ministers and members of the Church of England, but for ministers and other persons who were Protestant dissenters. Still I think it is allowable to throw further light upon the intentions of the founder, if that can be done, by evidence respecting herself and the particular religious party with which she was connected; and, if the phraseology of the deed was that which was in use in that party, to ascertain the sense in which it was used. We do not require any evidence to inform us that there did exist, at the time of these deeds, a large religious party denominated Protestant dissenters. I think that it is a legitimate inquiry whether Lady Hewley belonged to that party, and whether this was the phraseology of that party, and in what sense it was used, to what description of persons these terms were applied. It is in evidence, and it is uncontradicted, that the terms "godly ministers," "godly preachers," and "godly persons," were in common use by Protestant dissenters of that time, as applied to their ministers and preachers, and members who were considered to be devoted to religion. There is no evidence that, at that time, this phraseology was employed to designate any other description of persons. There is further evidence that Lady Hewley was a Protestant dissenter; and I think that she must be considered as sincerely attached to the party of which she was a member: that she was zealously affected to religon itself, is evident. Piety and benevolence pervade the [*623] *whole of the dispositions of her deeds. I think that it is further allowable to show, by extrinsic evidence, what description of persons could not have been, and what description of persons must have been, the objects of Lady Hewley's bounty; and, here, it is difficult, if not impossible, to distinguish between evidence and history; they run into each other, and they both concur. We learn, equally from the evidence and from history, that, at that time, there did exist, as there do now, three denominations of Protestant dissenters; Presbyterian, Independent (or Congregational) and Baptist: that, at that time, all the three were partakers of one common faith on those great points of doctrine which theologians have generally considered as fundamental (for the only difference which existed was that of infant baptism,) and that those doctrines which were so generally received, were irreconcileable with the faith of those who are now commonly denominated Unitarians. There is no trace in the evidence, neither is there any in history or biography, of any minister or preacher of any congregation of Protestant dissenters in England, who professed a belief in the doctrines of

Unitarianism, until nearly, if not quite, half a century after the execution of these deeds.

In the argument at your Lordships' bar, the learned counsel took a wide range of theological and historical discussion. It was contended that Lady Hewley being of the denomination called Presbyterian, she must be considered as averse from subscription to a test, because that was the prevalent opinion among Presbyterians at that period. If that was so respecting the denomination of Presbyterians, it is remarkable that it is the only point in which Lady Hewley appears to have differed from them; for, by prescribing the use of Bowles's Catechism, she manifested her opinion of the propriety of subscription to a test. It was further contended that she could never have intended to have benefited the members of the sect of Independents by her bounty, because, between the Independents and the Presbyterians, there had been fierce contentions upon the subject of church government; the Presbyterians having held with government by a presbytery; and the Independents, the independence of every separate congregation of which their body was composed. The learned counsel who used this argument did not, I think, advert very correctly to the history of the times. Between the time of those differences and the execution of these deeds, half a century had elapsed which teemed with important events. The contentions upon the subject of church government, which divided the Presbyterians and Independents, and inflamed them against each other, existed during the latter part of the reign of Charles the First and during the time of the Commonwealth. Each *was then struggling for ascendancy. After the passing [*624] of the Act of Uniformity, when the Presbyterians had failed in obtaining a comprehension with the Church of England, and when all Protestant dissenters had failed in obtaining toleration, they were all made subject to the same severe laws; they became all sufferers in the same cause; many of them were fellow-prisoners in the same jails. They learned to know each other better, and to love each other more; they learned to think less of the points of difference and more of the points of agreement. When the revolution had been accomplished and the Toleration Act (1 W. & M. c. 18) passed, they received one and the same protection, on condition of subscribing the Thirty-nine Articles of the Church of England, with the exception of those which related to church discipline and infant baptism; and, from that time, there is not a trace of those differences upon church government which had divided them, so widely, in the times to which I have adverted. The Presbyterians, indeed, although they retained the name of Presbyterians, became, substantially, Independents. They did not subject themselves to the rule of

any presbytery (as the Presbyterians of Scotland, with whom they had, at one time, united themselves, still do;) their congregations became, and were, and remain, each independent of every other; and, to this day, this is the case with all congregations of Protestant dissenters. At the time of the execution of these deeds, the three denominations of Protestant dissenters were united, as I have said before, in one common faith; and that was, so far as the doctrines in question were concerned, the same as the Church of England. The answer, therefore, which I humbly give to the first and second questions, is, that that part of the evidence adduced in this cause, which goes to show the existence of a religious party by which this phraseology was used, and the manner in which it was used and that Lady Hewley was a member of that party, is admissible for the purpose of determining who are the persons entitled under the descriptions in these deeds, and that the persons described are ministers, congregations and pious persons who are Protestant dissenters, and not Unitarians.

The third question propounded by your Lordships is, &c. I do not think that it is necessary to refer to the provisions of the deed of 1707, for the purpose of putting a construction upon the deed of 1704; but, if it were necessary, I should think that they may be referred to; as it appears to me that the deed of 1707 is neither more nor less than the completion of the plan of Lady Hewley for the application of her property to pious uses. I consider the whole as one transaction. The persons who were to carry into execution the trusts of the deed of 1707, were
[*625] *the same, with the addition of subordinate trustees. The deed conveys a hospital, then "recently erected," and which, probably, was in contemplation at the time of the execution of the deed of 1704, if not then commenced.

The fourth question is, &c. I am of opinion that ministers and preachers of what is called Unitarian belief and doctrine are excluded, not on account of any opinion of my own respecting the soundness or unsoundness of their belief and doctrine, for I utterly disclaim founding any judgment upon any such basis; but on account of the state of the law at the time this charity was founded.

The learned Judge here referred to the Toleration Act, (1 W. and M. c. 18, sec. 17,) and to (9 and 10 W. 3, c. 32.)

So the law stood when these deeds were executed. There is nothing in the deeds, which gives the least countenance to the supposition that Lady Hewley intended to give to persons who could not legally receive. Preachers of Unitarian belief and doctrine, if there had been any such at the time, (which there were not,) would not have been tolerated, and could not, in my

opinion, have been the object of Lady Hewley's bounty. The objects of her bounty I consider to be such Protestant dissenting preachers as were, at that time, within the protection of the Toleration Act. It would be most extravagant to suppose that Lady Hewley, by her description of "godly preachers of Christ's Holy Gospel," meant to describe persons who were considered, by the law at that time, as guilty of blasphemy.

The fifth question propounded by your Lordships is the same as to the deed of 1707. I am of opinion that persons of Unitarian belief and doctrine, are excluded from being objects of the charities of this deed. The rules and regulations established by Lady Hewley, require that the alms-people shall be able to repeat by heart, (which I understand to mean to repeat believingly,) the Lord's Prayer, the Commandments, the Creed, and Bowles' Catechism. Bowles' Catechism is inconsistent with the belief and doctrine of the Unitarians.

It has, however, been contended that, however incapable persons of Unitarian belief and doctrine were at the time of the execution of these deeds, yet, as the law now stands, they are not incapacitated, and that it is all in the discretion of the trustees. The statutes which have passed since, are the 19 Geo. 3, c. 44, and 53 Geo. 3, c. 160. By the 19 Geo. 3, the legislature relaxed the terms of subscription for Protestant dissenting ministers. Instead of subscribing the Articles of the Church of England, they were allowed to subscribe a general declaration of their belief that the Scriptures of the Old and New Testament as commonly received among Protestant churches, contain the revealed will of *God, and that they receive the same as the rule [*626] of their doctrine and practice; and, on subscribing this declaration, they became entitled to all the exemptions, benefits, privileges, and advantages granted to Protestant dissenting ministers by the Toleration Act. But this statute left the exception of those who denied the doctrine of the Trinity, unrepealed. This exception, however, and the penal enactment in 9 and 10 Will. 3, have both been repealed by 19 Geo. 3; and the law as respecting all Protestant dissenters is now the same. I cannot see how this removal of incapacity from taking the benefit of such charities as may now be founded for their benefit, can make them the objects of a charity which was not founded for their benefit, and which could not then be legally founded for their benefit. I think the investing of the trustees with the power of applying this trust to the promotion of Unitarian worship, would be the greatest possible perversion of the trust. I have always considered the intention of the founder to be the principle to be established—the rule to be abided by; and I think the language of Lord Eldon, in the *Attorney-General* v. *Pearson*, gives the rule

very distinctly. 3 Mer. 410. "From this deed, &c. * * * who founded it?"

Mr. Baron *Parke*:—I apprehend that there are two descriptions of evidence, (the only two which bear upon the subject of the present inquiry,) which are clearly admissible, in every case, for the purpose of enabling a Court to construe any written instrument and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, is it competent to receive evidence of the proper meaning of that language, as, when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used, which, at the time the instrument was written, had acquired any appropriate meaning, either generally or by local usage, or amongst particular classes. This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it and who take an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be, in the situation of the parties to it. From the context of the instrument, and from these two descriptions of evidence, with such
[*627] circumstances *as, by law, the Court, without evidence, may, of itself, notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible, the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written. The excepted cases in which such evidence is admissible, if, indeed, there be more than one excepted case, (that is, where there are two subjects or two objects, both described in the instrument, and each equally agreeing with it,) having no bearing whatever on the present question.

These being, I conceive, the only rules applicable to the present inquiry, I proceed to the question whether the extrinsic evidence adduced in this case, or what part of it, was admissible? In the first place, though the words "godly preachers of Christ's Gospel" are, without any evidence, intelligible, yet, according to the first rule above referred to, extrinsic evidence was by law admissible to show that these terms had acquired, by usage, a

peculiar meaning, either amongst a particular class to which Lady Hewley belonged, or in the particular locality where she dwelt, or, perhaps, generally throughout the kingdom, at the particular time the deed was executed; or the Court might have informed itself, from history and other general sources of information, of the meaning of the language used at that particular time. Evidence was therefore admissible that, amongst Protestant dissenters, or a peculiar sect of them, or generally amongts all persons, these words, though of a general nature and applicable *prima facie* to all poor and godly preachers of Christ's Holy Gospel, and of course including the ministers of the Established Church, had acquired a more limited meaning, and were confined to a certain description only of such preachers; and, supposing it to have been proved that a particular class had always used and understood these words in a restricted sense, it would have been unquestionably permitted to prove that Lady Hewley belonged to that class. When the appropriate meaning of these expressions has been established by competent evidence, then the deed is to be read as if the equivalent expressions were substituted; and no further evidence of the peculiar sect or religious opinions or any other circumstance attending the parties to the deed, is admissible to control or limit their meaning. Such evidence is not, in my judgment, material to enable the Court to construe the deed within the meaning of the second rule. * * * In this case, if it had been established, by conclusive evidence or from other legitimate sources, that the words, "godly preachers" *had meant, "Protestant dissenting ministers," no parol declaration of Lady Hewley that she intended only a particular class or sect or individuals with particular opinions, would have been admissible; nor could evidence of her conduct, character, habits or opinions, have been receivable to raise an inference of such intention. The deed must speak for itself, no matter what she intended to have done, even though it should be proved from her own mouth; still less what it may be supposed she would have wished to have done. The sole question is, what is the meaning of the words in the deed? and, if these, of themselves or with the aid of evidence of a peculiar signification attached by usage, mean all of a certain class, for instance, all such Protestant dissenting ministers as the trustees should from time to time select, it matters not that her own religious opinions would make such a disposition unlikely; it is a case of "*quod voluit non dixit.*" This observation applies equally wherever general terms are used in a deed: their meaning cannot be limited by proof of any intention of the individual party, whether expressed in words or implied from conduct, habit or character; and, if they be not limit-

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ed on the face of the deed itself, the general words must be carried into effect, and their construction must be the same, whoever the parties to the deed may be. * * *

Having made these observations, I proceed to give my answer to the first question proposed by your Lordships. I must own that I much doubt whether any of the evidence offered in the case to explain the meaning of the general words used, was admissible. The sermon of Dr. Coulton, and the will of Sir John Hewley, were clearly inadmissible to prove the religious opinions of Lady Hewley; and the parol testimony of Dr. Pye Smith, Dr. Bennett, and Mr. Walker, to the 17th interrogatory, which they found upon their acquaintance with various publications of that day, I hardly think can range itself within the class of cases in which the opinion of men of science or skill is admitted on a question of science or art. But this inquiry would not be very material, if, from the above mentioned sources of information (which are equally open to the court as to the witnesses,) it appeared that the general terms: "godly preachers of Christ's Holy Gospel," had acquired a peculiar meaning when used by Protestant dissenters. I am inclined to think that it does so appear; and that these words used by dissenters, do not comprise members of the Church of England; and, if so, I am of opinion that evidences of Lady Hewley being a Protestant dissenter, was properly admitted, though some of it was not of an admissible character; but not the evidence offered for the purpose of showing that she was a Trinitarian dissenter.

[*629] *The second question proposed by your Lordships is, &c. It appears to me that, coupling the evidence, which I have before stated to be admissible, of Lady Hewley being a Protestant dissenter, and the usage since the time that the deed of 1704 came into operation, by which members of the Church of England have uniformly been excluded, the term: "godly preachers," &c., used by her, meant a class of persons not of the Church of England; and I infer this partly from the use of the term godly, partly from that of the word poor, which may have been used in the sense of unendowed, principally because the term preachers was not usually applied to the ministers of the Church of England, who had their liturgy and homilies, but rather to those who looked on preaching as the principal and the most effectual means of extending the influence of religion. I have no doubt also that ministers of the Roman Catholic faith, were not included in that term. Protestant dissenters, therefore, alone, are the proper objects of the charity: but who are the class of Protestant dissenters who are entitled under this provision, is a question I feel no small difficulty in determining after much consideration of the case. Is the charity to be confined to

those persons who should, "from time to time," belong to the class who, in 1704, answered the description of poor and godly preachers of Christ's Holy Gospel; or is it to be extended to all such then or at any future time answering the description of godly preachers of the Gospel; and, if the former be the true construction, who are the Protestant dissenters that, in 1704, were designated by the deed, as godly preachers of Christ's Holy Gospel? Did that description comprise all, not within the pale of the church, who, being Protestants and pious and poor, preached the Gospel of Jesus Christ as containing the revealed will of God and the rule of doctrine and practice, expounding it according to their own opinions; or is it to be confined to one class only of these, or extended to all with the exception of a particular class? It is on this part of the case I have felt and still feel much doubt; but I incline to think that the former is the true construction, and that it is more reasonable to hold that the founder had the then state of religious opinions in her view, and did not contemplate any change, and meant, therefore, to bestow her bounty on all that should, from time to time, belong to the class which was then designated as godly preachers of Christ's Holy Gospel, or such as should be, from time to time, poor and godly preachers of what was then understood by the term of, "Christ's Holy Gospel." And, if we so read the words of the instrument, I can have very little difficulty in saying that those who impugned the doctrine of the Holy Trinity, *did not, at the date of the deed, answer this description, [*630] as it was then generally understood in the Christian world; and I need no better evidence of that fact than the recital, in the statute of 9 & 10 Will. 3, passed in the year 1698, which states such opinions to be blasphemous and impious and contrary to the doctrines and principles of the Christian religion, and greatly tending to the dishonor of Almighty God. Proceeding then on this ground, that the words of the deed, as we may presume they were then generally understood, did not comprise those who impugned the doctrine of the Holy Trinity, (not because they were not then tolerated by the law,) I concur in the opinion already expressed, on this question, by the majority of my brethren, and think that the charity is to be confined to Protestant Trinitarian dissenters. * * *

The meaning of the term, "poor and godly preachers," having been settled, it does not appear to me that there is much difficulty in ascertaining the other objects of Lady Hewley's bounty. The widows must be those of Protestant dissenting ministers as above described. The preaching of Christ's Holy Gospel, which the trustees are to promote, and the ministry of Christ's Holy Gospel for which young men are to be educated, would seem to

have the same meaning, that is, the preaching and ministry by Protestant Trinitarian dissenters; and godly persons generally, being fit objects of the charity, must, I rather think, by reason of these last words, be those of the same persuasion. The poor persons who are to be admitted into the almshouse, are clearly defined by the terms of the deed of 1707, and the rules made by Lady Hewley pursuant thereto. They must be Protestants. They must be able to repeat the Lord's Prayer, Creed, Ten Commandments, and Mr. Edward Bowles's Catechism, and they must, of course, believe in the doctrines contained in the Creed and Catechism. If they are Protestants, though they may be of the Church of England, who do conscientiously believe in those doctrines, they are admissible; if they do not, they are incapable of partaking of this branch of the charity.

In answer to the third question, I am of opinion that, as the deed of 1704 was complete in itself, and no power reserved to alter or vary the trusts of it,(*a*) that deed must be construed by itself, and without any aid from the deed of 1707, and, therefore, that none of the provisions of the latter deed, can be referred to for this purpose.

[*631] *My answer to the fourth question proposed by your Lordships is already given in assigning my reasons for the answer to the second.

In answer to the fifth question, I have to state that I am of opinion that Unitarians who do not conscientiously believe the doctrines in the Creed and Edward Bowles's Catechism, are excluded from the benefit of the charities of the deed of 1707; and I collect, from the answer and evidence in the case, that the generality of that body do not believe in the doctrine of original sin and the atonement, in the sense in which these terms are used in that Catechism, and, therefore, are not proper objects of this branch of the charity.

Lord Chief Justice *Tindal*:—My Lords, before I proceed to state what appear to me, on the best consideration I can give to this important case, the proper answers to be given to the several questions proposed, I thing it desirable, for the purpose of making those answers more intelligible and precise, and of avoiding, at the same time, needless repetition, to state, generally, upon what grounds, and within what limits I conceive parol evidence admissible to explain the meaning of the words used in a written instrument, so far, at least, as the consideration of that question applies to the circumstances of the present case. The general rule I take to be that, where the words of any written instru-

(*a*) This is a mistake: the deed of 1704, as set forth in the appendix to the respondent's case, did contain a power to revoke the trusts and to declare new ones.

ment, are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application, of those words, to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party, in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from as a corollary to the general rule above stated, that, *where any doubt arises upon the [*632] true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that, by no other means, can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which, in many instances, use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general, common meaning, have acquired, by custom or otherwise, a well-known, peculiar, idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument and to carry such real meaning into effect. But,

whilst evidence is admissible, in these instances, for the purpose of making the written instrument speak for itself, which, without such evidence, would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that, in no case whatever, is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to: it would be evidence which, in most instances, could not be met or countervailed by any of an opposite bearing or tendency, and would, in effect, cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed. And I conceive it is upon the proper application of this rule to the facts of the present case, that the answers to the several questions proposed by your Lordships, ought to be founded; all of which appear to be framed [*633] for the purpose of solving the general problem, *what was Lady Hewley's intention as expressed in the deeds of 1704 and 1707, and what description or classes of persons were the objects of her bounty at the time those deeds were respectively executed? For, whatever was her intention then, whoever were the persons intended to take at the time of the execution of those deeds, the same must be the construction of her intention now, and the same her objects at the present day.

Keeping in view these general observations, I would beg to state, in answer to the first question, that I conceive, when a doubt has been once raised as to the meaning of these words, that is, in the present case, as to the persons intended by Lady Hewley under the terms "godly preachers of Christ's Holy Gospel," "godly persons" and the other expressions, the Court by which that doubt is to be decided, has a right to inform itself, and is bound, if possible, to learn what was the acknowledged and received sense and meaning which those expressions bore at the time when Lady Hewley lived, and, as near as may be, at the time of the execution of those deeds; and, for that purpose, that all extrinsic evidence calculated to throw light upon the meaning of those words at that time, is clearly admissible. Of that description are public records and documents throwing light upon the religious history of the times; the language of the statute-book and every enactment relating to the state and

condition of the Church and of the religious sects then known in England; contemporary history; contemporary treatises and tracts upon the religious tenets held by the different sects; the works of men of acknowledged eminence and weight in their respective persuasions, and published and circulated at that period; and the early and contemporaneous application of the funds of the charity itself by the original trustees under the deeds. All extrinsic evidence of this nature, which must be considered, both from the arguments of counsel at your Lordships' bar, and from the reference made thereto, in their judgments, by the learned Judges in the court below, to have been actually applied in the determination of the case, though not formally tendered, was strictly and properly admissible for the purpose of explaining the sense in which the language contained in the deeds was used at the time, and in which it is now to be construed. But, as the evidence which I have just described, is evidence which is presumed to be in the mind of the Judge or Court, it is evidence which they furnish to themselves by reading, research, and reflection, not that which they receive from the mouth of witnesses; and, on this account, I think all the extrinsic evidence which was actually given, in the cause, for the purpose of determining who were entitled under *the [*634] terms "godly preachers of Christ's Holy Gospel" and other expressions used in the deeds, was inadmissible.(a) Such, for instance, as the evidence of Dr. Pye Smith and Dr. Bennett as to the religious opinions of the Presbyterians and of other Protestant dissenters in the time of Lady Hewley; their interpretation of the terms used in the deeds; and their evidence of the religious opinions of Lady Hewley herself. The production also of the will of Sir John Hewley and of Lady Hewley, in proof of the private religious opinions of Lady Hewley, appears to me, both in respect to the point to which they were produced, and to the character of the evidence itself, not admissible by law. It is unnecessary, however, to specify each particular article of the evidence produced, after having traced out the general nature of the evidence on which alone I think the construction of the deeds ought to depend.

In answer to the second question, and applying to that question no other evidence than that which I conceive to be admissible for the construction of the trust deeds, I think it may be satisfactorily concluded that, at the time of the execution of those deeds, the words, "godly preachers of Christ Holy Gospel"

(a) The other judges stated the rules as to the admissibility of extrinsic evidence to explain written instruments, in much the same terms.

and "godly ministers, had acquired, generally in England, a particular and limited meaning, and were used to point out and designate those acknowledged classes of Protestant dissenters from the Established Church, who were at that time, tolerated by law. The words, indeed, if taken separately and singly, would, undoubtedly, in their literal meaning, be large enough to comprehend all men of pious and godly habits of life who preached the true doctrine of the Holy Gospel, of whatever church or persuasion they might be, whether priest of the Church of Rome, or beneficed clergy of the Established Church in England, or dissenters from that church of every denomination; provided only they possessed the two requisites or conditions, viz., that they were men of godly habits of life, and preached the true Gospel of Christ; and the words themselves, taken singly and separately, do not appear to have varied, in any degree, from their original meaning. The word, "godly," for some centuries before the time of Lady Hewley, had been used in many passages in the translation of the Bible, and had been read daily in the confession of sins set forth in the Liturgy, precisely in the same sense which it bore in the times of Lady Hewly; and in the same sense has it continued to be
[*635] read down to the present day; and again, "the *Holy Gospel of Christ," it is unnecessary to observe, is, in its own nature, unchanged and unchangeable. But, notwithstanding that the original sense of the separate words is retained to the present day, it appears beyond doubt, on reference to the public history of former times, that the phrases above referred to had obtained generally in England, long before the date of the foundation deeds, a less extensive signification. The term "godly" had been originally applied, by the Puritans, to the preachers approved by them; and, at the time of Lady Hewley, had descended to those who, at that time, formed the body of Non-conformist dissenters from the Established Church. "Preachers," again, was a term which, in Lady Hewley's time, was affected by the dissenters from the Established Church, who considered themselves rather as persons whose mission was to preach the Gospel, than to minister the ordinances and lead the devotion of the people: and, indeed, in the Act of Toleration, those very persons are described as "Preachers and Teachers." And, lastly, the word "poor" did, in a most especial manner, point at those for whom no public provision was made by the state, but who subsisted on the voluntary contributions of their respective flocks. I consider, therefore, at the time of the execution of these deeds, the phrase "godly preachers of Christ's Holy Gospel," had acquired the new and particular sense of preachers of the different classes of Protestant dissenters from

the Established Church, who professed and preached what were generally acknowledged, at that time, to be the doctrines of the Holy Gospel of Christ, and who were then tolerated by the law of the land; and which classes, it is well known, were, at that time, divided, amongst themselves, into the Presbyterians, the Independents or Congregationalists, and the Baptists, all of whom were believers in the doctrine of the Holy Trinity. It is possible also, that, at the precise period of the execution of these deeds, there might be some members of the Church of England still existing, who had, either voluntarily quitted their benefices, or had been ejected from them on account of scruples of conscience, first, during the reign of Charles the 2d, on the ground of non-conformity, and, afterwards, at the period of the Revolution, on account of their refusal to take the oaths to the new government; and that these persons might also, at that time, be held to fall within the scope of Lady Hewley's bounty. But it is obviously unnecessary, at the present time, to enter into any minute discussion on that point.

After this explanation of the words "godly preachers," I cannot conceive any doubt can exist as to the description of the widows and young men intended for the ministry, who *are mentioned in the deeds; and, with respect to the [*636] persons described in the deed of 1704, under the terms of "such godly persons in distress, being fit objects of the said charity, as the said trustees shall think fit,"(a) I should think that these words, accompanying and following the former, would be construed in conformity with them, and be intended to mean persons of the same persuasion, or professing the same religious principles with the more immediate objects of the trust; or, at the least, that such persons would be entitled to a preference before others, in the administration of the funds. And, lastly, as to the persons entitled to receive the bounty of Lady Hewley's deed of 1707, namely, persons placed in the almshouse founded by her, I think those persons are marked out, more clearly and definitely, to be such as, at that time, were members of some of the bodies of Protestant dissenters from the Established Church before described; for the test which is prescribed, by the rules of Lady Hewley, as to their admission, "that every almsbody must be able to repeat, by heart, the Lord's Prayer, the Creed, and Ten Commandments and Mr. Edward Bowles's Catechism;" and the direction that the inmates were duly to repair to "some religious assembly of the Protestant religion every Lord's day, forenoon and afternoon," lead to the necessary conclusion, that,

(a) So in original.

on the one hand, the foundation was not intended for persons of the Established Church, and, on the other, that it was confined to the members of the bodies of dissenters which were known and acknowledged in fact as such bodies, and recognized and tolerated by law.

In answer to the third question, I beg to state my opinion to be that, in putting a construction upon the deed of 1704, the provisions of the deed of 1707 cannot be referred to. By the deed of 1704, the property contained in it is conveyed, absolutely, to trustees upon certain trusts therein contained. The deed of 1707 conveys property of Lady Hewley, to the same persons indeed, as are named in the deed of 1704; but other and different property, and upon other and different trusts. If the latter deed had recited, or, in any manner whatever, referred to the deed of 1704, the two deeds might then have been considered as made *in pari materia*, or, in effect, as forming one deed; and the deed of 1707 might then have been directly and immediately appealed to, as explaining the intention of the foundress of the charity under the first deed. But the second deed is so far from containing any recital or reference to the first, that, in the provision for applying the residue of the rents, the deed of 1707,
[*637] instead of referring to the trusts of the *deed of 1704, repeats them again in terms. I, therefore, conceive them to be perfectly independent deeds, and can see no legal principle of construction by which the provisions of the latter deed can be called in aid of the construction of the former, which is the only point to which your Lordships' third question adverts.

In answer to the fourth and fifth questions, I beg to state that the opinion at which I have arrived, founded upon that which appears to me to be the true principle of construction of those deeds, is that ministers and preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being the objects of the charities of both those deeds. First, taking the deed of 1704 by itself, I think the objects of it are limited to the ministers and others of the several bodies of Protestant Dissenters from the Established Church, which were generally known, established and tolerated at the time the deed took effect; and I am unable to find any proof, from any authentic source, that the Unitarians did form, in fact, at that time, a body or class of Protestant dissenters known and established in the kingdom. On the contrary, so far as can be inferred from the evidence produced or any other evidence of an historical nature, the Unitarians, as a body of persons of known religious tenets in

England, were unknown until a period much later than the execution of either of the deeds in question: but further, so far were the persons who preached Unitarian doctrines from forming a religious body then known and acknowledged in the kingdom, that, at the time of the execution of these very deeds, such persons could not avail themselves of the benefit of the Toleration Act, 1 William & Mary, c. 18, on the ground of their being persons who denied the doctrine of the Trinity; and, under the statute 9 & 10 Will. 3, c. 32, were, at that time, liable to certain penalties and disabilities, if, by writing or teaching, they denied the doctrine of the Trinity. When, therefore, in the deed of 1704, provision is made for "godly preachers of Christ's Holy Gospel," I think the answer to your Lordships' fourth question, must be in the affirmative; first, because there were existing at the time, certain bodies of Protestant dissenters, well known and ascertained, who preached doctrines which had been generally understood and believed in all ages of the church, and were also generally acknowledged, at the time of the execution of the deed of 1704, to be the Holy Gospel of Christ, of which bodies the Unitarians did not, at that time, constitute one: and, as the deed was so framed that the trusts were to take immediate effect and *operation,(a) it must be held to apply to the [*638] preachers and others of such bodies only which did then actually exist, and, at that time, answer the description in the deed. And, secondly, because the deed describes the persons who are to take, to be the preachers of "the Holy Gospel of Christ;" and it is undeniable that, at the time of the execution of this deed, both the Church of England as by law established, and all the known classes or bodies into which Protestant dissenters were divided, held the doctrine of the Trinity to be a fundamental part of their faith, that is, of the Holy Gospel of Chist; and that, at the time of the execution of that deed, the Legislature also considered the belief in the doctrine of the Trinity as essential to the description of a preacher of Christ's Holy Gospel, punishing those who preached doctrines which denied it.

If the persons who believe and preach Unitarian doctrines, are excluded from the benefit of the deed of 1704, I think they are more clearly and unequivocally excluded by the deed of 1707; for, by the rules and orders given by Lady Hewley for the regulation of the poor persons to be placed in the almshouse, which rules, being made by Lady Hewley under a power reserved by her in the deed itself and therein expressly referred to, may, beyond doubt, be called in aid in the interpretation of the mean-

(a) The trusts were not to come into operation until Lady Hewley's death.

ing of that deed, it is directed that "every almsbody is required to be one who can repeat, by heart, the Lord's Prayer, the Creed, and Ten Commandments, and Mr. Edward Bowles's Catechism:" which regulations appear, to my mind, to prove, beyond any doubt, that the foundress intended the inmates of the hospital and the other objects of her charity under that deed, to be persons who believed in the doctrine of the Holy Trinity. And, referring myself to the evidence given in this cause, of the Unitarian belief and doctrine as to the Divinity of Christ, I cannot understand that any person professing those doctrines, could honestly or conscientiously repeat by heart, that is, express his belief in the doctrines contained in the Catechism of Mr. E. Bowles. And, if it had been necessary to determine the intentions of Lady Hewley as to the doctrinal belief of the inmates of her hospital without reference to the Catechism of Bowles, it must not be forgotten that, upon the authority of two eminent persons well known at the time in question, I mean Dr. Barrow and Mr. Baxter, the doctrine of the Divinity of Christ was held to be sufficiently acknowledged, as a matter of belief, by those who received the Apostles' Creed alone. (See Barrow's [*639] Treatise on *the Creed, under the clause, 'His only Son,' and Baxter, in his treatise, 'Directions for Weak Christians,' part 2, sec. 53, 1.) And the weight of the observation for the present purpose, consists, not so much in the consideration of the truth of the conclusion at which Barrow and Baxter have arrived, as in the proof it affords of the fact that, by all bodies of Christians by whom the Apostles' Creed was received, that is, in England, by the members of the Established Church, and of all the dissenting communities then known, the doctrine of the Holy Trinity was also received and believed: and it is by the current acknowledged use of language at that time that this deed is to be construed. In the latter deed, therefore, I think Lady Hewley expresses her clear and undoubted intention that no Protestant dissenter who denies the Divinity of Christ, that is, no Unitarian, shall partake of her bounty.

The learned Judges having delivered their opinions, the further consideration of the case was postponed, in order that The House might have time to review the arguments therein contained.

1842: *5th August.*—The following opinion was delivered by Lord *Cottenham*, C., on moving the judgment of the House of Lord:—My Lords, the opinions which have been delivered by the learned Judges, have so far exhausted this case, in all the most material parts of it, that I do not deem it necessary to enter,

at large, into the very interesting and important matters which were discussed at the bar.

The principal object of the suit was to have it declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity. The decree appealed from established the affirmative of that proposition; and, of the seven Judges who attended the hearing at the bar of this House, six concurred in it. I cannot suppose that your Lordships will think that there is ground for differing from this opinion; and, if that should be your Lordships' feeling upon it, the result will necessarily be an affirmance of the decree.

I cannot, however, omit to make some observations as to the *media* through which this conclusion has been arrived at by the different authorities, by whom this subject has been considered. Your Lordships will have observed that, *in [*640] the discussion in the Court of Chancery, a very large range of evidence was admitted with a view of coming to a decision as to what was the intention of Lady Hewley; which could, after all, only be judged of by the language and terms used in the deeds. In what respect and for what purposes this evidence was properly received, was the subject of one of the questions put to the learned Judges, and has been the subject of some difference in their opinions. It does not appear to me necessary to consider, minutely, those differences; because I conceive that, keeping strictly within those rules which all the opinions recognize, there is sufficient, upon the view taken by the great majority, to support the conclusion to which they have come upon the main point in the case. It was very clearly and shortly laid down, by Mr. Baron Gurney: "that that part of the evidence which goes to show the existence of a religious party by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party, is admissible." That being, in effect, no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at the time. Much evidence indeed appears to have been received which, if of a nature to be received, might fall under the rule, but which was objectionable upon other grounds: such as the opinions of living witnesses. But, rejecting all such evidence, enough appears to me to remain, unobjectionable in itself and properly received for the above purpose, to support the conclusion to which a great majority of the learned Judges have come. I have thought it right to make these observations upon this matter of evidence, as, otherwise, the affirmance of the decree might seem to sanction

the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases.

It may be thought that this opportunity should be taken of specifying what description of persons are, hereafter, to be considered as proper objects of the charity. I think that any attempt to do this would be dangerous, and would be more likely to promote than to prevent future litigation; as it is impossible, *a priori*, to foresee the consequences of any such declaration, or to have sufficient information as to the various interests upon which it may operate, and which are not represented in this suit. What has passed in this cause, and the valuable opinions which the Judges have delivered, will, it may be hoped, afford such light to the trustees as to enable them satisfactorily to administer the funds for the future.

It was made part of the complaint upon this appeal, [*641] that *some of the trustees had been removed, as to whom it had not been proved that they entertained opinions inconsistent with the declared purposes of the trust. I do not consider the removal of any of the trustees as implying any reflection upon their moral conduct. But as, by the decision of the Court, it was found that the application of the funds for the time past, had not been consistent with what appeared, to the Court, to be the real object of the charity, and as a large discretion must necessarily be left, to the trustees, for the future, I think that, as a matter of discretion, it was right to select others for the future management of the funds; and, if that was right in 1833, it certainly would be indiscreet to adopt a different course in 1842. I cannot therefore think that it will be right to alter this part of the decree.

I propose, therefore, to your Lordships to dismiss this appeal; and I see no ground for departing from the usual course of giving to the respondents the costs.

1841.—Papillon v. Papillon.

*Papillon *v.* Papillon. [*642]

1841: 18th and 19th February.

Estates were settled on A. for life, remainder to trustees, for 1,000 years, to raise 5,000*l.* for the portions of his daughters and younger sons, and, subject thereto, to A. in fee: provided that, if A. in his lifetime or by his will, should give to any of his children entitled to portions under the trusts of the term, any sum of money, &c., for or towards their advancement in marriage or otherwise, the same should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child; unless A. should, by writing under his hand, declare to the contrary. A. had eight daughters and two younger sons. By his will, after reciting the limitations and trusts of the settlement, he devised the estates, subject to the 5,000*l.*, to trustees in trust, by sale or mortgage, to raise money to supply the deficiency of his personal estate for payment of his debts and legacies, and, in the next place, to pay 2,000*l.* to each of his younger sons; and he declared that, after payment of his debts and legacies, and the sums of 2,000*l.*, the estates, or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made, by the trustees, in pursuance of the power thereinbefore given to them for that purpose,) should go to his eldest son. Held that the will did not contain anything that was equivalent to a declaration that the legacies of 2,000*l.* should not be a satisfaction for the portions of the two younger sons, and, consequently, that they were not entitled to their legacies, and also to their shares of the 5,000*l.*

Thomas Papillon, Esq., by his marriage settlement, dated in 1791, conveyed estates to the use of himself, for his life, with remainder to the use of trustees, for the term of 1,000 years, to commence from his death, upon the trusts after mentioned, and subject thereto, to the use of himself in fee. The trusts of the term were for raising 5,000*l.* for the portions of the daughters and younger sons of the marriage; the portions to be vested at the usual times, but not to be raised and paid until after T. Papillon's death; and the settlement contained a provision for the maintenance and education of the children, in case their father should die before their portions became vested. It provided also that, if the father should, in his lifetime or by his will, settle, give, *devise or bequeath, to or upon [*643] any of his children entitled or who might become entitled to portions under the trusts of the term, any sum or sums

of money, lands, goods, or chattels, for or towards his, her, or their advancement or preferment in marriage or otherwise, then such money, lands, goods or chattels should be accounted as part, if less, or, if as much or more, as and for the whole of the portion or portions thereby provided for him, her or them, unless the father should, by writing under his hand, signify and declare to the contrary; and that, in case the father should, to the satisfaction of the trustees, secure the payment of the 5,000*l.* and such maintenance as aforesaid, upon or out of any other manors, messuages, &c., not thereinbefore granted and released, of sufficient estate and value for that purpose, then the term and the trusts thereof should cease.

There was issue of the marriage three sons and eight daughters, all of whom attained twenty-one before the bill was filed.

By a deed poll dated the 30th of October, 1811, T. Papillon substituted estates in Kent, which he had purchased of W. Bennett and Sir John Honywood, for the estates comprised in the term.

By his will dated the 10th of September, 1825, after reciting that, by his marriage settlement, the estates therein comprised were limited, after his decease, to trustees for a term of 1,000 years upon trust to raise 5,000*l.* for the portions of his daughters and younger sons, to be equally divided amongst them, and to be paid at such time and with such benefit of survivorship, and with such maintenance in the meantime as therein were mentioned, and, subject thereto, to the use of himself and
[*644] *his heirs and assigns, and, after reciting also that the last mentioned estates had been discharged from, and other estates subjected to, the term and the trusts thereof by the deed poll of the 30th of October, 1811, he gave, amongst other legacies, 50*l.* to each of his daughters, for mourning, and devised the farms and lands purchased by him from William Bennett and Sir John Honywood, and the estates comprised in his marriage settlement, (subject, nevertheless, as to the premises purchased from Wm. Bennett and Sir John Honywood, to the 5,000*l.* charged thereon as aforesaid,) to trustees, in trust, by mortgage or sale, or out of the rents, to raise money to pay such

of his debts and legacies as his personal estate should fall short of paying; and, in the next place, to pay 2,000*l.* to each of his younger sons, John Papillon and Alexander Fred. Wm. Papillon, (who were the plaintiffs in the cause,) when and as they should respectively attain the age of 21 years, with interest, from the day of his decease, at 4*l.* per cent. per annum; and he declared that, after payment of the debts and legacies and the sum of 2,000*l.* to each of his younger sons, the hereditaments and premises devised to his trustees, or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made by the trustees in pursuance of the power thereinbefore given to them for that purpose,) should go to certain uses therein referred to, being uses in favor of the defendant Thomas Papillon, the testator's eldest son: provided that if the plaintiffs or either of them should die before they or he should attain 21, then the 2,000*l.* thereinbefore directed to be raised for the son so dying, should sink into the estates from which it was thereinbefore directed to be raised, for the benefit of the *persons who should become entitled to the estates. The testator added that he thought it right to declare that it was not from any want of affection to his daughters that he did not make any larger provision for them under his will; but because the kindness of other relations had rendered it unnecessary for him to do so. [*645]

The testator died in April, 1838. The plaintiffs had received their legacies of 2,000*l.*, but had not been paid any part of the 5,000*l.*

The bill alleged that the defendant, Thomas Papillon, refused to allow the Plaintiff's shares of the last-mentioned sum to be raised, pretending that the legacies were to be accounted as and for the whole of the portions proivided, for the plaintiffs, by the settlement, and in full satisfaction thereof. The bill prayed that the principal and interest due to the Plaintiffs, in respect of their shares of the 5,000*l.*, might be raised by sale of the premises comprised in the term, or otherwise by an exercise and in pursuance of the trusts thereof.

1841.—Papillon v. Papillon.

The defendant put in a general demurrer.

Mr. *Jacob* and Mr. *Freeling*, in support of the demurrer: Under the settlement, the legacies given to the plaintiffs, must be taken to be a satisfaction of their shares of the 5,000*l.*, unless the testator has, by writing under his hand, declared to the contrary. It will be contended that, as the testator has devised the premises comprised in the term of 1,000 years, subject to the 5,000*l.*, he has done that which is equivalent to declar-
[*646] ing *that the legacies shall not be a satisfaction of the Plaintiff's shares of the 5,000*l.* He has devised the farms in the only way in which he could devise them, namely, subject to the charge thereon. *Fazakerley* v. *Gillibrand.*(*a*) In *Leake* v. *Leake*,(*b*) (which will be relied on by the plaintiff's counsel,) the testator directed that the settlement by which the portions were provided for his younger children, should be punctually complied with: but here, the testator has given no such direction.

Mr. *Knight Bruce* and Mr. *Simpson*, in support of the bill: It is laid down by Lord Eldon, C., in *Leake* v. *Leake*, that it is not necessary that a testator should declare, in express terms, that the legacies which he gives, by his will, to his children, shall not be a satisfaction of their portions; but that it is sufficient if it appears, on the will, that the testator did not intend the legacies to be a satisfaction of the portions. We contend that, in this case, it plainly appears, on the will, that the testator did not intend that the legacies given to the plaintiffs, should be a satisfaction of their shares of the 5,000*l.*

The recitals in the will, show that the settlement, and the provision thereby made for the younger children, and the substitution, which the testator had made of the estates purchased from Bennett and Sir John Honywood, for the estates comprised in the settlement, were present to the testator's mind when he made his will: and he devises those purchased estates subject,

(*a*) Ante, Vol. VI. p. 591. (*b*) 10 Ves. 477.

specificially, to the 5,000*l.*, to the trustees in trust to raise *the legacies of 2,000*l.*; so that he has directed [*647] the trustees, specificially, to raise the legacies out of the fund subject to the 5,000*l.* It may be said that, where an estate is devised subject to a mortgage, the latter words are merely words of description; but the answer to that argument is that the mortgagee is not the person who is intended to be provided for by the devise, or take any benefit under it.

The words of the will show that the testator intended that the state of his property, as it existed at the date of his will, should not be altered; but that all the incumbrances upon it, should remain as they then were.(*a*)

THE VICE-CHANCELLOR:—I think that, *prima facie*, the portions are discharged by payment of the legacies of 2,000*l.*; and it is incumbent on those who say that they are not, to show that the testator has done something which is equivalent to declaring, by a writing under his hand, that they shall not be discharged.

The testator, in his will, recites that the estates comprised in his settlement, were limited, after his decease, to trustees, for a term of 1,000 years, in trust to raise 5,000*l.* for the portions of his daughters and younger sons, and, subject thereto, to himself in fee; and that those estates had been discharged from the term and the trusts thereof, and other estates substituted for them. That is nothing more than a general review of the state of his property. Then, after giving certain legacies, he devises a leasehold estate, and certain pieces of land in Romney Marsh, and also certain advowsons, which he *names, to trus- [*648] tees in trust to sell and to pay the proceeds, together with the general residue of his personal estate, in or towards payment of his debts and funeral and testamentary expenses and legacies, and to pay over the surplus, if any, to his eldest son. Then he devises the messuages, farms and lands, purchased by him of W. Bennett and Sir John Honywood, and the advowson of the rectory of Bonnington in Kent, and all other his freehold, lease-

(*a*) 3 Swans. 210, note.

hold and copyhold estates whatsoever and wheresover not thereinbefore devised and bequeathed, (subject, nevertheless, as to the farms and lands, thereinbefore mentioned to have been purchased of Bennett and Sir J. Honywood, to the sum of 5,000*l.* charged thereon as aforesaid,) that is, as they then stood, to the same trustees, their heirs, &c., to the use, as to the advowson, of the trustees for the term of 99 years upon certain trusts, and, as to the rest of the hereditaments and premises lastly thereinbefore devised, and, as to the advowson (after the expiration of the term of 99 years,) to the use of the trustees, their heirs, &c., in trust to raise, by sale or mortgage, so much money to be applied in payment of such of his debts and legacies, as the leasehold estate, marsh land and advowsons firstly before devised to them, should fall short of paying; and, in the next place, to pay 2,000*l.* to each of his younger sons, who are the Plaintiffs in this cause. Then he declares that, after payment of his debts and legacies, and the sum of 2,000*l.* to each of his said younger sons, the hereditaments and premises lastly devised to his trustees, or such parts thereof as should remain unsold for any of the purposes aforesaid, subject nevertheless to any mortgages or mortgage which should be made, by his trustees, in pursuance of the power thereinbefore for that purpose given to them, should go, remain and be, and that his trustees should stand seised *thereof to the uses under which the defendant claims to be entitled. So that, when he declares the uses of his residuary real estates, he omits to mention the term of 1,000 years, and seems to suppose that the t last mentioned estates will go to his eldest son, subject only to any mortgage or mortgages which the trustees might find it necessary to make in order to enable them to pay his debts and legacies in full, and the legacies of 2,000*l.* to each of his younger sons.

[*649]

I am of opinion, therefore, that there is nothing, in this will, which is equivalent to a declaration that the legacies given to the plaintiffs, shall not be a satisfaction of their shares of the 5,000*l.*

Demurrer allowed.

MEMORANDUM.

Daniel v. *Dudley*, reported *ante*, p. 163, was reversed by Lord Cottenham, C. See 1 Phill. 1;

and

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AN

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2. A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file. ——— v. *Christopher*, 409

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1. J. R. Bridges, having five freehold houses, but no other property, in Cable street, Liverpool, agreed to sell them to J. Bleakley for 248*l.*; and, thereupon, drew up the following memorandum *in his own handwriting:* "July 26th, 1839.—John Bleakley agrees with J. R. Bridges, to take the property in Cable street, for the net sum of 248*l.* 10*s.*" Held that the agreement was sufficiently signed by the vendor. *Bleakley* v. *Smith*, 150

2. By an agreement between an author and a bookseller, after reciting that the author had prepared a new edition of one of his works, and that the bookseller was desirous of purchasing it; it was agreed that Messrs. H. (printers) should print 2,500 copies of the work, in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay, to the former, for the said edition, a certain sum by instalments, the first to be paid as soon as the edition was ready for publication, &c.; the work to be divided into three volumes, and to be sold, to the public, at 3*l.* Held that the bookseller was not, merely, a purchaser of 2,500 copies of the work, but was, in equity, an assign of the copyright of it, to the extent that he was to be the sole publisher of it, until the whole edition, consisting of 2,500 copies, should be sold; and, consequently, that a bill by him to restrain a piracy of the work, was not demurrable. Held, also, that, notwithstanding some of the passages alleged to have been pirated, were contained in the prior editions as well as in the new edition of the work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed. The injunction having been granted on the plaintiff undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit, at the trial, that the plaintiff was the legal proprietor of the pirated work. *Sweet* v. *Cater*, 572

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ANNUITY.

The court refused to order an estate charged, by a will, with an annuity, to be either mortgaged or sold for payment of the annuity, notwithstanding the rents were very inadequate to pay it, and it had become greatly in arrear; the estate being settled on A. for life, with remainders over; the annuitant being still alive, and there being no necessity for the court to direct the estate to be either sold or mortgaged for payment of the testator's debts. *Graves* v. *Hicks*, 551

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A defendant who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that he and his co-partners had given express directions, to their agent, in whose custody the books were, not to produce them to any one, or allow any stranger to inspect them, without the express authority of the defendant and his co-partners: that the books were not in the power of the defendant alone, but of the defendant and his co-partners, and that the defendant had no right or lawful power to produce them, or to set forth their contents, without the consent of his co-partners. Held that the answer was insufficient; as the defendant did not state that his co-partners had refused to consent to his setting forth the entries. *Stuart* v. *Lord Bute*, 443

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APPOINTMENT.

1. Under a marriage settlement a sum of consols was held in trust for the husband for life, remainder as to a certain portion of it for the wife for life, remainder for such one or more of the children as the husband and wife should appoint, remainder for the children at 21; and, as to the rest of the consols, in trust, after the husband's death, for the children, absolutely, at 21. There were five children who attained 21. Their parents, conceiving that they had power to appoint the whole of the consols, made appointments, at different times, to two of them, which more than exhausted that portion of the consols which was appointable. Each deed of appointment declared that the appointee should not be entitled to any further or other share in the trust fund, under the settlement, until he should have put in hotchpot the thereby appointed share; unless a contrary intention should be expressed in the instrument by which any further appointment should be made. Held that, though the appointable part of the consols was not sufficient to answer, fully. the second appointment, yet there was to be no apportionment, and that the second appointee as well as the first, was prevented by the hotchpot clause, from taking any part of his one-fifth of the unappointable consols, unless he would give up the whole of what he would get under the appointment; and that the unappointable consols belonged, wholly, to the three other children. *Warde* v. *Firmin*, 235

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penses, debts and legacies; and she also claimed one moiety of the 4,250*l.* for the last six months of the testator's life, and insisted that it ought to be raised, as a debt, out of the real estates. Held that the funeral and testamentary expenses, debts and legacies were payable out of the real estates only, and that the widow was entitled to the whole of the personal estate including the arrears of rent; but that she was not entitled to the moiety of the 4,250*l.*, that sum being payable only out of the rents, and there being, in consequence of her claim before mentioned, no rents to pay it with. *Jones* v. *Bruce*, 221

See LEGACIES, 1. POWER OF SALE, 2.

CHARITY.

An information and bill was filed, to set aside a long lease of premises vested in the Coopers' Company for charitable purposes. The plaintiffs were three members of the court of assistants of the company, (who alleged that they acted as trustees of the charity,) and an almsman and almswoman, who were objects of the charity. A general demurrer to the information and bill was allowed, as no relief was prayed with respect to the plaintiffs individually. But leave was given to amend the record, by making it an information only. *Attorney-General* v. *East India Company*, 380

See DISSENTERS. EXTRINSIC EVIDENCE.

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See COPYRIGHT, 4. HUSBAND AND WIFE. MARRIAGE SETTLEMENT. POLICY OF INSURANCE.

CLERK OF RECORDS AND WRITS.

The clerk of records and writs is not compellable to file the answer of a defendant who has refused to take an office-copy of the bill. *Aked* v. *Aked*, 437

COLLUSION.

See AFFIDAVIT, 1.

COMPROMISE.

See VOLUNTARY DEED.

CONFIRMATION.

See REPORT, 1.

CONSTRUCTION.

1. Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be, from time to time, a sufficient discharge. Held that the daughter and her children living at the testator's death were entitled to the residue jointly. *De Witte* v. *De Witte*, 41

2. "I give, to my wife, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease." Held that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house, and the interest of a sum due on mortgage, did not pass. *Fryer* v. *Ranken*, 55

3. Testator, by his will, gave 500*l.* to A., and 1,000*l.* to B., to be paid *within* 12 calendar months after his wife's death. By a codicil of the same date, he reduced those legacies to 300*l.* and 500*l.* respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest, in his will, of 500*l.* to A., he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that, by his will, he had given to R. 3,000*l.*, he reduced that legacy to 2,000*l.*; and then directed that the 300*l.* given to A. as well as the 1,000*l.* given to B., should not be paid till twelve months *after* the death of his wife. Held, taking all the instruments together, that B. was entitled to a legacy of 1,000*l.* *Grand* v. *Reeve*, 66

4. Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death; but only one of them survived the annuitant. Held that the capital of the stock which

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2. A ... tween ... thoug... are ... gist ... 55 ... annuity was free of legacy duty. *Morris* v. *Burton*, 161

8. Testator, by his will, after devising his real estates, and giving pecuniary legacies, directed his debts, funeral and testamentary expenses, and the legacies *thereby* given, to be paid as soon as conveniently might be after his death: "And I charge my debts and legacies on my real and personal estate." By a codicil he gave to A. and B. a sum of stock, and directed the trustees and executors of his will (who were the same persons) to purchase and transfer the stock to A. and B., in trust to C. for life: and, subject thereto, in trust to permit the same to *return to*

...dren as ..., and that one ...s the testator's life- ...ended for that child was ... Testator directed that the ... given, by his will, to females, ...ed or single, should be for their own ...enefit and their children, and should never be subjected to the control of their respective husbands. Held, that the females took for their lives, for their separate use, with remainders to their children. *Bain* v. *Lescher*, 397

11. A testator directed the income of his property to be accumulated for the term of 21 years *from* his death. The testator died on the 5th January, 1840. Held that, in the computation of the term, the day of his death was to be excluded: and, consequently, that the dividends on stock which became due on the 5th January, 1841, were subject to the trust for accumulation. *Gorst* v. *Lowndes*, 434

12. Testator devised lands, subject to annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another annuity to his wife, to his grandson and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and, thereupon, the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were

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s v. *Hicks*, 536

See AGREEMENT, 2. APPOINTMENT, 1, 2. COSTS, 4. DEED, 2. EXTRINSIC EVIDENCE. HEIR AND EXECUTOR, 1. LUNATIC. MISNOMER. PORTIONS. POWER OF SALE. SETTLEMENT, 1, 2. TRUST, 1.

CONTEMPT.

1. Plaintiff did not proceed, within the time limited by 11 Geo. 4, and 1 Will. 4, c. 36, Rule 13, to take the bill *pro confesso* against a defendant who was in prison for want of answer. After that time had expired, the defendant filed his answer, and then moved, under the rule, to be discharged, without costs. Held, that as the defendant had not applied to be discharged until after he had disabled the plaintiff, by filing his answer, from proceeding to take the bill *pro confesso*, the case was not within the rule, and therefore, the defendant could not be discharged without paying the costs of his contempt. *Williams* v. *Newton*, 45

See INJUNCTION, 5.

CONVERSION.

Two brothers, A. and B., entered into co-partnership, without articles, and purchased land for the purposes of their trade, with money borrowed from C., and had the land conveyed to themselves in moieties to uses to bar dower. Shortly afterwards they mortgaged the land to C. in order to secure the money borrowed. A. died intestate, leaving B. his heir. B. continued the partnership. Each of the partners insured buildings on the land, and paid for the insurance out of the interest on the capital of their partnership [illegible] and D. paid off the mortgage. Their partnership proceeded, and a re-conveyance of the land was made to themselves as joint tenants in fee. A. died, leaving his heir, who was also the heir of A., claimed the land; but the Court held that it was converted into personalty, and dismissed the bill. *Houghton* v. *Houghton*, 491

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1. A bill in equity will not lie for a partition of copyholds. *Horncastle* v. *Charlesworth*, 315

2. The probate of a will is not a sufficient authentication of it so far as it relates to copyholds. *Archer* v. *Slater*, 507

COPYRIGHT.

1. The defendants published a work containing an original essay on modern English poetry, biographical sketches of 43 modern poets, and selections from their poems, amongst which were six short poems and parts of longer poems, the copyright whereof belonged to the plaintiff. The selections constituted, altogether, the bulk of the defendants' work; but were alleged to have been introduced into it for the purpose of illustrating the essay. The Court restrained the publication of the defendants' work as being an infringement of the plaintiff's copyright. *Campbell* v. *Scott*, 31

2. Where a party seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated; although, he does not claim copyright in all the passages which are the same in both works. *Sweet* v. *Maugham*, 51

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1. A defendant who is required to set forth accounts, is bound to set them forth as well as he is able, without much labor or expense, and he is not bound (more especially where he has not been a party to the transactions, but is only the representative of a party, and the accounts are long and complicated) to refer to the books for the purpose of making out the accounts. He must, however, allow the plaintiff to inspect the books. *Christian* v. *Taylor*, 401

2. If the executors and trustees of a will file a bill for the purpose of having the rights of the defendants in the residue ascertained without either praying that the accounts of the personal estate may be taken or offering to account for it, but admitting that there is a residue; the court will declare the rights of the defendants in the residue, without directing the accounts of the personal estate to be taken, although the defendants apply at the hearing to have the accounts taken. *Blathwayt* v. *Taylor*, 455

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ACCOUNTS AND INQUIRIES.

See PRELIMINARY ACCOUNTS AND INQUIRIES.

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Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement

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1. Where a bill of interpleader is filed by the officer of a company, on behalf of the company, the affidavit annexed ought to state, not that the plaintiff does not collude, but that, to the best of his knowledge and belief, the company do not collude with the defendants. *Bignold* v. *Audland*, 23

2. A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file. ——— v. *Christopher*, 409

AGREEMENT.

1. J. R. Bridges, having five freehold houses, but no other property, in Cable street, Liverpool, agreed to sell them to J. Bleakley for 248*l.*; and, thereupon, drew up the following memorandum *in his own handwriting:* "July 26th, 1839.—John Bleakley agrees with J. R. Bridges, to take the property in Cable street, for the net sum of 248*l.* 10*s.*" Held that the agreement was sufficiently signed by the vendor. *Bleakley* v. *Smith*, 150

2. By an agreement between an author and a bookseller, after reciting that the author had prepared a new edition of one of his works, and that the bookseller was desirous of purchasing it; it was agreed that Messrs. H. (printers) should print 2,500 copies of the work, in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay, to the former, for the said edition, a certain sum by instalments, the first to be paid as soon as the edition was ready for publication, &c.; the work to be divided into three volumes, and to be sold, to the public, at 3*l.* Held that the bookseller was not, merely, a purchaser of 2,500 copies of the work, but was, in equity, an assign of the copyright of it, to the extent that he was to be the sole publisher of it, until the whole edition, consisting of 2,500 copies, should be sold; and, consequently, that a bill by him to restrain a piracy of the work, was not demurrable. Held, also, that, notwithstanding some of the passages alleged to have been pirated, were contained in the prior editions as well as in the new edition of the work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed. The injunction having been granted on the plaintiff undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit, at the trial, that the plaintiff was the legal proprietor of the pirated work. *Sweet* v. *Cater*, 572

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ANNUITY.

The court refused to order an estate charged, by a will, with an annuity, to be either mortgaged or sold for payment of the annuity, notwithstanding the rents were very inadequate to pay it, and it had become greatly in arrear; the estate being settled on A. for life, with remainders over; the annuitant being still alive, and there being no necessity for the court to direct the estate to be either sold or mortgaged for payment of the testator's debts. *Graves* v. *Hicks*, 551

See Legacy-duty.

ANSWER.

A defendant who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that he and his co-partners had given express directions, to their agent, in whose custody the books were, not to produce them to any one, or allow any stranger to inspect them, without the express authority of the defendant and his co-partners: that the books were not in the power of the defendant alone, but of the defendant and his co-partners, and that the defendant had no right or lawful power to produce them, or to set forth their contents, without the consent of his co-partners. Held that the answer was insufficient; as the defendant did not state that his co-partners had refused to consent to his setting forth the entries. *Stuart* v. *Lord Bute*, 442

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See Restraint on Alienation.

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CHARGE OF DEBTS AND LEGACIES.

Testator gave, to his wife, all his goods, chattels, and personal estate whatsoever, and charged his real estates with the payment of his funeral and testamentary expenses and debts, and exempted his personal estate from the payment thereof. He then gave pecuniary legacies to two of his children, and charged his real estate with the payment of them; and directed that, during the minority of the legatees, his trustees, their heirs and assigns, should raise, out of the rents of his real estate, or by any other means they might deem expedient, annual sums for the maintenance of the legatees, not exceeding four *per cent. per annum*, upon their respective legacies. Some years afterwards, the testator was found a lunatic; and, by an order in the lunacy, 4,250*l.* was allowed, yearly, for the maintenance of him and his family; and such allowance was to be made from the 6th of April, 1834, and to be continued, from time to time, until further order, and to be paid, to his wife, by the committees of his estate, out of the rents and profits thereof. The testator died on the 6th of October, 1839. His wife had received all that was due in respect of the allowance down to the 6th of April, 1839, but nothing afterwards. She claimed, under his will, his personal estate, including the rents of his real estates due at his death, free from the payment of his funeral and testamentary ex-

penses, debts and legacies; and she also claimed one moiety of the 4,250*l.* for the last six months of the testator's life, and insisted that it ought to be raised, as a debt, out of the real estates. Held that the funeral and testamentary expenses, debts and legacies were payable out of the real estates only, and that the widow was entitled to the whole of the personal estate including the arrears of rent; but that she was not entitled to the moiety of the 4,250*l.*, that sum being payable only out of the rents, and there being, in consequence of her claim before mentioned, no rents to pay it with. *Jones* v. *Bruce*, 221

See LEGACIES, 1. POWER OF SALE, 2.

CHARITY.

An information and bill was filed, to set aside a long lease of premises vested in the Coopers' Company for charitable purposes. The plaintiffs were three members of the court of assistants of the company, (who alleged that they acted as trustees of the charity,) and an almsman and almswoman, who were objects of the charity. A general demurrer to the information and bill was allowed, as no relief was prayed with respect to the plaintiffs individually. But leave was given to amend the record, by making it an information only. *Attorney-General* v. *East India Company*, 380

See DISSENTERS. EXTRINSIC EVIDENCE.

CHOSE IN ACTION.

See COPYRIGHT, 4. HUSBAND AND WIFE. MARRIAGE SETTLEMENT. POLICY OF INSURANCE.

CLERK OF RECORDS AND WRITS.

The clerk of records and writs is not compellable to file the answer of a defendant who has refused to take an office-copy of the bill. *Aked* v. *Aked*, 437

COLLUSION.

See AFFIDAVIT, 1.

COMPROMISE.

See VOLUNTARY DEED.

CONFIRMATION.

See REPORT, 1.

CONSTRUCTION.

1. Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be, from time to time, a sufficient discharge. Held that the daughter and her children living at the testator's death were entitled to the residue jointly. *De Witte* v. *De Witte*, 41

2. "I give, to my wife, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease." Held that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house, and the interest of a sum due on mortgage, did not pass. *Fryer* v. *Ranken*, 55

3. Testator, by his will, gave 500*l.* to A., and 1,000*l.* to B., to be paid *within* 12 calendar months after his wife's death. By a codicil of the same date, he reduced those legacies to 300*l.* and 500*l.* respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest, in his will, of 500*l.* to A., he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that, by his will, he had given to R. 3,000*l.*, he reduced that legacy to 2,000*l.*; and then directed that the 300*l.* given to A. as well as the 1,000*l.* given to B., should not be paid till twelve months *after* the death of his wife. Held, taking all the instruments together, that B. was entitled to a legacy of 1,000*l.* *Grand* v. *Reeve*, 66

4. Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death; but only one of them survived the annuitant. Held that the capital of the stock which

had been provided to answer the annuity, did not vest in the surviving child, on the annuitant's death; but vested, on the testator's death, in all the children then living, as tenants in common. *Watson* v. *Watson*, 73

5. Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes. Held, nevertheless, that they were entitled to only one share, each, of the residue. *Pruen* v. *Osborne*, 132

6. Testator bequeathed his residue to the children, then living, of T. B. and W. C., and the lawful issue then living of such of their children as were dead, as tenants in common, so nevertheless that such *issue* should, as amongst themselves, take as tenants in common, and *per stirpes* and not *per capita*; it being his intention that such *issue* should have only the shares which their respective parents would have been entitled to, if living. Held that the word "issue" must be taken in the restricted sense of "children." *Pruen* v. *Osborne*, 132

7. Testator directed his executors to set apart a sum, not more than 7,500*l.*; the dividends of which, when invested as after directed, would amount to or produce the clear yearly sum of 300*l.*, clear of all deductions whatsoever, and to invest the sum so to be set apart, in government or other securities; and he directed that if, at any time, the dividends of the trust moneys should, from any cause whatsoever, prove insufficient to answer the purposes aforesaid, the trustees should, out of the residue of the moneys that should come to their hands, raise such further sum as should be sufficient to make good any deficiency, and apply the same accordingly: and he gave the annuity to the plaintiff for life. Held that the annuity was free of legacy duty. *Morris* v. *Burton*, 161

8. Testator, by his will, after devising his real estates, and giving pecuniary legacies, directed his debts, funeral and testamentary expenses, and the legacies *thereby* given, to be paid as soon as conveniently might be after his death: "And I charge my debts and legacies on my real and personal estate." By a codicil he gave to A. and B. a sum of stock, and directed the trustees and executors of his will (who were the same persons) to purchase and transfer the stock to A. and B., in trust to C. for life: and, subject thereto, in trust to permit the same to *return to* and become part of his personal estate. Held that the charge in the will, extended to the legacy given by the codicil. *Rooke* v. *Worrall*, 216

9. Testator gave 5,000*l.* to his sons, in trust for his daughter Mrs. W., so as not to be subject to the debts, acts or control of her husband; and he gave the like sum to his daughter Mrs. A., *in trust as aforesaid, for the use of herself and children.* Mrs. A, had two children living at the testator's death. Held, that they did not take either as joint-tenants or tenants in common with her; but that she was entitled to the whole income of the fund, for her life, for her separate use, with remainder to her children. *French* v. *French*, 257

10. Testator directed his residue to be divided amongst the children of L. D., to wit, J. D., E. D., and A. D. Held that the gift was not made to the children as a class, but as individuals; and that one of them having died in the testator's lifetime, the share intended for that child was undisposed of. Testator directed that the legacies given, by his will, to females, married or single, should be for their own benefit and their children, and should never be subjected to the control of their respective husbands. Held, that the females took for their lives, for their separate use, with remainders to their children. *Bain* v. *Lescher*, 397

11. A testator directed the income of his property to be accumulated for the term of 21 years *from* his death. The testator died on the 5th January, 1820. Held that, in the computation of the term, the day of his death was to be excluded; and, consequently, that the dividends on stock which became due on the 5th January, 1841, were subject to the trust for accumulation. *Gorst* v. *Lowndes*, 434

12. Testator devised lands, subject to annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another annuity to his wife, to his grandson and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and, thereupon, the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were

not duly attested. He then made a fourth, which was duly attested, "revoking several of the dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate of every kind; and, instead of such devise, disposition and bequest thereof, I do give all my freehold, copyhold and personal estate of every kind and wheresoever situate, unto my daughter, for her life; and, after the determination of that estate, unto my grandson *and his heirs in strict entail as in my will directed.*" He then directed that his grandson, who was an infant, should not be put in possession of his estates, until he attained thirty-one; and that, in the interval, the rents should be accumulated for the benefit of his grandson and his heirs: "and, *in failure of issue of my said grandson*, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils and gave another annuity to his wife; thereby, in all other respects but what was above mentioned, ratifying and confirming his will and codicils. Held that the grandson took not an estate tail, but only an estate for life in the lands. If lands are devised in trust to be settled on A., and his heirs in strict entail, the lands ought to be settled on A. for life, and on the persons designated as his heirs, in succession. *Graves* v. *Hicks*, 536

See AGREEMENT, 2. APPOINTMENT, 1, 2. COSTS, 4. DEED, 2. EXTRINSIC EVIDENCE. HEIR AND EXECUTOR, 1. LUNATIC. MISNOMER. PORTIONS. POWER OF SALE. SETTLEMENT, 1, 2. TRUST, 1.

CONTEMPT.

1. Plaintiff did not proceed, within the time limited by 11 Geo. 4, and 1 Will. 4, c. 36, Rule 13, to take the bill *pro confesso* against a defendant who was in prison for want of answer. After that time had expired, the defendant filed his answer, and then moved, under the rule, to be discharged, without costs. Held, that as the defendant had not applied to be discharged until after he had disabled the plaintiff, by filing his answer, from proceeding to take the bill *pro confesso*, the case was not within the rule, and therefore, the defendant could not be discharged without paying the costs of his contempt. *Williams* v. *Newton*, 45

See INJUNCTION, 5.

CONVERSION.

Two brothers, A. and B., entered into co-partnership, without articles, and purchased land for the purposes of their trade, with money borrowed from C., and had the land conveyed to themselves in moieties, to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir. B. then took D. into partnership. Each of the firms erected trade buildings on the land, and paid for them and for the insurance on them, and also paid the interest on the mortgage-money out of their partnership funds. Ultimately, B. and D. paid off the mortgage out of their partnership property, and took a re-conveyance of the land to themselves as joint tenants in fee. B. died, and his heir, who was also the heir of A, claimed the land; but the court held that it was converted into personalty, and dismissed the bill. *Houghton* v. *Houghton*, 491

COPYHOLDS.

1. A bill in equity will not lie for a partition of copyholds. *Horncastle* v. *Charlesworth*, 315

2. The probate of a will is not a sufficient authentication of it so far as it relates to copyholds. *Archer* v. *Slater*, 507

COPYRIGHT.

1. The defendants published a work containing an original essay on modern English poetry, biographical sketches of 43 modern poets, and selections from their poems, amongst which were six short poems and parts of longer poems, the copyright whereof belonged to the plaintiff. The selections constituted, altogether, the bulk of the defendants' work; but were alleged to have been introduced into it for the purpose of illustrating the essay. The court restrained the publication of the defendants' work as being an infringement of the plaintiff's copyright. *Campbell* v. *Scott*, 31

2. Where a party seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated; although, he does not claim copyright in all the passages which are the same in both works. *Sweet* v. *Maugham*, 51

3. Where an injunction restraining an infringement of copyright, is continued, subject to the plaintiff bringing an action, the court will not allow the defendant to continue the sale of his work, he keeping an account, unless the plaintiff will consent. *id*

4. By an agreement between an author and a bookseller, after reciting that the author had prepared a new edition of one of his works, and that the bookseller was desirous of purchasing it; it was agreed that Messrs. H. (printers) should print 2,500 copies of the work in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay, to the former, for the said edition, a certain sum by instalments, the first to be paid as soon as the edition was ready for publication, &c.: the work to be divided into three volumes, and to be sold, to the public, at 3*l*. Held that the bookseller was not, merely, a purchaser of 2,500 copies of the work, but was, in equity, an assign of the copyright of it, to the extent that he was to be the sole publisher of it, until the whole edition, consisting of 2,500 copies, should be sold; and, consequently, that a bill by him to restrain a piracy of the work, was not demurrable: held, also, that, notwithstanding some of the passages alleged to have been pirated, were contained in the prior editions, as well as in the new edition of the plaintiff's work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed. The injunction having been granted on the plaiutiff undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit, at the trial, that the plaintiff was the legal proprietor of the pirated work. *Sweet* v. *Cater*, 572

CORPORATION.

See INJUNCTION, 6. PLEA AND PLEADING, 3.

COSTS.

1. A. agreed to sell land to a railway company; but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant. Held, that, although the company were bound, by their act, to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit and of having the conveyance settled by the master, must be paid out of the purchase-money. *Midland Counties Railway Company* v. *Westcomb*, 57

2. New security ordered to be given for costs, the surety having become bankrupt. *Veitch* v. *Irving*, 122

3. On the 25th of July the defendant served a notice of motion to dismiss, to be made on the 29th, the next seal On the 27th, plaintiff replied, and tendered 20*s*. costs to defendant, which the defendant refused to accept until he had ascertained whether he ought to do so or not, and the whole of the 28th was allowed him for that purpose. At eight o'clock in the evening of the 28th, plaintiff instructed counsel to appear on the motion. At ten in the morning of the 29th, defendant said he would accept the costs. The Court held that he was too late, and ordered him to pay the costs of the motion, *minus* 20*s*. *Piper* v. *Gittens*, 282

4. Under 1 & 2 Vict. c. 110, s. 17 and 18, interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate. *Attorney-General* v. *Nethercote*, 529

See FORECLOSURE. MULTIFARIOUSNESS, 2.

COVENANT.

The lessee of an inn covenanted to use and keep it open as an inn, during the term, and not to do any act whereby the licenses might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant, the lessor obtained an *ex parte* injunction, restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licenses might become forfeited or be refused. But the injunction was afterwards dissolved, the court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same, in effect, as ordering him to keep an inn; and no intention having been shown on the part of the defendant to violate the negative part of the covenant. *Hooper* v. *Brodrick*, 47

CREDITOR.

Although an order for preliminary accounts and inquiries has been obtained, in a suit for administering a testator's estate, yet the court will not, on that account, restrain a creditor from suing the executors at law. The order, however, does not prevent the parties from having the cause heard before the master has made his report. *Teague* v. *Richards*, 46

See DECREE.

CREDITOR'S SUIT.

See PARTIES, 3.

D.

DEBT.

See CHARGE OF DEBTS AND LEGACIES. LUNATIC. POWER OF SALE, 2.

DEBTOR AND CREDITOR.

See CREDITOR. DECREE. INSOLVENT, 1, 2.

DECREE.

Two decrees had been made for the administration of the estate of A. B. deceased, one in a creditor's suit, and the other in a legatee's suit. A motion by the plaintiff in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, was refused, there being no suggestion of a deficiency of assets. *Plunkett* v. *Lewis*, 379

See ACCOUNTS, 2. PRACTICE, 13.

DEED.

1. By a marriage settlement, trusts were declared of a sum of money, the wife's property, for her separate use for life, for her husband for life, for their children as the wife should by deed or will appoint; in default of appointment, for the children equally; if there should be no child, then for such persons as the wife should appoint by deed or will, and, in default thereof, for the *executors or administrators of the wife*. The ultimate trust took effect. Held that, by *the executors or administrators* of the wife, her next of kin at her death, were meant, there being, throughout the settlement, an evident intention to exclude the husband from taking more than a life interest. Reversed, see 1 Phillips, 1. *Daniel* v. *Dudley*, 163

2. In 1704, Lady Hewley, a Protestant Non-conformist, conveyed estates to trustees for the benefit of such poor and godly preachers for the time being of Christ's Holy Gospel, and for such poor and godly widows for the time being, of poor and godly preachers of Christ's Holy Gospel, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel, in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should approve of; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit. At and for several years after the date of the conveyance, all sects tolerated by law believed in the Trinity. But, in the course of time the estates became vested in trustees, of whom the majority (though calling themselves Presbyterians) were Unitarians, and one was a member of the Church of England: and they applied the rents for the benefit of Unitarians. At the hearing of an information filed, against the trustees, the court held that neither Unitarians nor members of the Church of England were entitled to participate in the management or benefits of the charity; and ordered the trustees to be removed; and afterwards appointed members of three different sects of Trinitarian dissenters in their place. *Attorney-General* v. *Shore*, 592

See APPOINTMENT, 1, 2. EXTRINSIC EVIDENCE. MAINTENANCE, 2. MARRIAGE SETTLEMENT, 2.

DEFENDANT.

1. A defendant in a suit for taking accounts omitted to insert, in his examination, any receipts or payments by him during a certain period; the plaintiff, however, proved receipts by him during that period. The court refused to allow the defendant to bring in a further examination or additional accounts, or to give any evidence of payments in order to discharge himself from those receipts. *Maddeford* v. *Austwick*, 209

2. A defendant who is required to set forth accounts, is bound to set them forth as well as he is able, without much labor or expense, and he is not bound (more especially where he has not been a party to the transactions, but is only the representative of a party, and the accounts are long and complicated) to refer to the books for the purpose of making out the accounts. He must, however, allow the plaintiff to inspect the books. *Christian* v. *Taylor*, 401

3. Where the documents of which a defendant is required to set forth a list, are numerous, it is not necessary for him to specify each of them; but it is sufficient for him to describe them, so as to enable the plaintiff to move for them; as for instance, to say that they are contained in bundles or hogsheads, sealed up, and marked A. B., &c. *id*

4. A defendant who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that he and his co-partners had given express directions to their agent, in whose custody the books were, not to produce them to any one, or allow any stranger to inspect them, without the express authority of the defendant and his co-partners: that the books were not in the power of the defendant alone, but of the defendant and his co-partners, and that the defendant had no right or lawful power to produce them or to set forth their contents, without the consent of his co-partners. Held that the answer was insufficient, as the defendant did not state that his co-partners had refused to consent to his setting forth the entries. *Stuart* v. *Lord Bute*, 442

See ACCOUNTS, 2. INSUFFICIENCY. OFFICE-COPIES. PRACTICE, 13.

DEMURRER.

A. instituted a suit against B. and C. respecting a sum of 4,000*l*. D. also was made a party to the suit; but having no interest, he disclaimed. A., B. and C. afterwards came to a compromise, in pursuance of which they executed a deed, assigning the 4,000*l*. to trustees, in trust to pay to D. his costs of the suit, and to divide the rest of the fund amongst A., B. and C. D., though he was not a party either to the compromise or the deed, filed a bill against A., B. and C., and the trustees, to compel a performance of the trust and payment of his costs. A demurrer by C., for want of equity, was allowed. *Gibbs* v. *Glamis*, 584

See AGREEMENT, 2. CHARITY.

DEMURRER ORE TENUS.

See MULTIFARIOUSNESS, 2.

DISCOVERY.

1. A defendant at law may file a bill of discovery, not only to sustain his defence to the action, but to rebut the evidence in support of it. *Glascott* v. *Copper Miners' Company*, 305

2. The rule that officers of a corporation may be made co-defendants to a bill against the corporation, applies to a bill for discovery as well as to a bill for relief; and members of the corporation may be joined with the officers. *id*

3. A., B. and C. were members and three of the directors of a mining company, and also lessees, in trust for the company, of mines in Nova Scotia, under a lease by which a portion of the profits was reserved to the lessor. The lessor's executors filed a bill against A., B. and C., for an account of the profits of the mines, and required them to set forth a list of all accounts, &c., relating to the mines in the possession of them or their agents. The defendants set forth a list of all the accounts in the possession of themselves and of the secretary of the company in London, adding that there were other accounts in the possession of the company's agent in America; that the defendants had no power to inspect or use the accounts of the company, except when sitting at the board of directors or by an order of the board; and that they had not the permission of the board to use the accounts for the purposes of the suit, and they believed that the directors declined to allow them to use the same, or to give them any further information which might enabe the plaintiffs to prosecute the suit. Held that the answer was insufficient, as it did not state that the defendants had, as they lawfully might, applied to the agent in America for a list of the accounts in his possession. *Taylor* v. *Rundell*, 391

DISMISSAL.

1. The court will not, even before replication, dismiss a bill to perpetuate testimony, for want of prosecution: but will order the plaintiff to reply and examine his witnesses, and procure the examination to be completed by a certain time; and, in default thereof, to pay to the defendant his costs of the suit. *Beavan* v. *Carpenter*, 22

2. Where a bill has been dismissed for want of prosecution against a defendant, who, at the hearing, is held to be a necessary party; the court will not allow the plaintiff to bring him before the court again, by supplemental bill, but will dismiss the bill with costs. Affirmed in 1843. *Lautour* v. *Holcombe*, 71

3. On the 25th of July, the defendant served a notice of motion to dismiss, to be made on the 29th, the next seal. On the 27th, plaintiff replied, and tendered 20*s.* costs to defendant, which the defendant refused to accept until he had ascertained whether he ought to do so or not, and the whole of the 28th was allowed him for that purpose. At eight o'clock in the evening of the 28th, plaintiff instructed counsel to appear on the motion. At 10 in the morning of the 29th, defendant said he would accept the costs. The court held that he was too late, and ordered him to pay the costs of the motion, *minus* 20*s.* *Piper* v. *Gittings*, 282

4. An order was made that a cause should stand over, with liberty to the plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs. The plaintiff made default, and the defendant obtained an order to dismiss, without notice. Held that the order was regularly obtained. *Dobede* v. *Edwards*, 454

DISSENTERS.

In 1704, Lady Hewley, a Protestant Non-conformist, conveyed estates to trustees for the benefit of such poor and godly preachers for the time being of Christ's Holy Gospel, and for such poor and godly widows for the time being, of poor and godly preachers of Christ's Holy Gospel, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel, in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should approve of; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit. At and for several years after the date of the conveyance, all sects tolerated by law believed in the Trinity. But, in the course of time the estates became vested in trustees, of whom the majority (though calling themselves Presbyterians) were Unitarians, and one was a member of the Church of England: and they applied the rents for the benefit of Unitarians. At the hearing of an information filed, against the trustees, the court held that neither Unitarians nor members of the Church of England were entitled to participate in the management or benefits of the charity; and ordered the trustees to be removed; and afterwards appointed members of three different sects of Trinitarian dissenters in their place. *Attorney-General* v. *Shore*, 592

See CHAPEL. EXTRINSIC EVIDENCE.

DOCUMENTS.

Where the documents of which a defendant is required to set forth a list, are numerous, it is not necessary for him to specify each of them; but it is sufficient for him to describe them, so as to enable the plaintiff to move for them; as, for instance, to say that they are contained in bundles or hogsheads, sealed up, and marked A. B., &c. *Christian* v. *Taylor*, 401

See EXHIBIT.

E.

ELECTION.

An unmarried lady being entitled to 5,000*l.* charged upon a real estate of which she was tenant for life, with remainder to her children in tail, and being entitled also to a sum of stock, for her life, with remainder to her children absolutely, by the settlement on her marriage, released the real estate from the 5,000*l.*; and, supposing that the stock was her absolute property, settled it on her husband for life, with remainder to her children. After the marriage, the parties to the settlement having discovered the mistake as to the stock, made an indorsement on the settlement, by which, after reciting that

they had so discovered, they declared that, thenceforth, the stock should be held by the original trustees thereof, (in whose name it was still standing,) upon the trusts to which it was subject before and at the date of the settlement. Held that the children of the marriage could not claim the benefit of the release of the 5,000*l.*, and also the sum of stock to the prejudice of their father's interest therein under the settlement; but that before the indorsement was made, he was entitled to put them to their election, and that he had not lost that right, by being a party to the indorsement. *Seton* v. *Smith*, 59

EQUITABLE MORTGAGE.

See VENDOR AND PURCHASER, 2.

EVIDENCE.

If a document has not been proved, nor has any order been obtained for proving it, *viva voce*, at the hearing, the Court will not allow it to be proved on the cause being heard, either on the equity reserved, or for further directions. *Blundell* v. *Gladstone*, 489

See COPYHOLDS, 2. EXTRINSIC EVIDENCE. MISNOMER.

EXAMINATION.

See ANSWER, 1.

EXECUTORS AND ADMINISTRATORS.

1. By a marriage settlement, trusts were declared of a sum of money, the wife's property, for her separate use for life, for her husband for life, for their children as the wife should by deed or will appoint; in default of appointment, for the children equally; if there should be no child, then for such persons as the wife should appoint by deed or will, and, in default thereof, for the *executors or administrators of the wife.* The ultimate trust took effect. Held that, by *the executors or administrators* of the wife, her next of kin at her death, were meant, there being, throughout the settlement, an evident intention to exclude the husband from taking more than a life interest. Reversed, see 1 Phillips, 1. *Daniel* v. *Dudley*, 163

2. Testator, after reciting that his property consisted of a house at C., (which was freehold,) and of mortgages, &c., directed the house to be sold; and then gave several pecuniary legacies, and amongst them, 300*l.* to G., and 100*l.* to P., whom he appointed his executors. The will concluded thus: "and to Mr. G., who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled." G. died the day after the testator, without having proved the will. Held, in a suit by his executors against the testator's heir and next of kin, that the plaintiffs were entitled to the residue of the testator's estate, including the proceeds of the house. *Griffiths* v. *Pruen*, 202

3. If an executor is also the residuary legatee, he is entitled to the residue, although he does not prove the will. *id*

See INDEMNITY. PARTIES, 3. PRACTICE. 13.

EXECUTORY TRUST.

Estates settled so as to go along with a barony in fee. Form of settlement approved of by the Court, in pursuance of a direction contained in a deed executed by the late Lord Le Despencer that his estates should, so far as the law would allow, be strictly settled, after his death, so as to go along with the baronial dignity of Le Despencer (which was a barony in fee,) and be held and enjoyed by the person for the time being possessed of the same dignity, for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of the late Lord, but with a provision that in case the dignity should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the coheirs *per stirpes* of the person or persons respectively by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, ocasioned. *Bankes* v. *Le Despencer*, 508

EXHIBIT.

If a document has not been proved, nor has any order been obtained for proving it *viva voce* at the hearing, the court will not allow it to be proved on the cause

being heard, either on the equity reserved or for further directions. *Blundell* v. *Gladstone*, 489

EXONERATION.

See LUNATIC.

EXTRINSIC EVIDENCE.

Opinions delivered, by the judges, to the House of Lords, as to the admissibility of extrinsic evidence, for the purpose of determining who were entitled to the benefit of a charity founded, by Lady Hewley, in 1704, for the benefit of "poor and godly preachers, for the time being, of Christ's Holy Gospel," "godly persons in distress, being fit objects of the foundress's and the trustees' bounty, &c.;" and as to who were the proper objects of the charity, supposing such evidence to be admissible; whether Unitarians were excluded, and whether a deed of 1707, made between the same parties, and for the same and other charitable purposes, could be referred to for the purpose of construing the deed of 1704. *Attorney-General* v. *Shore*, 616

See MISNOMER.

F.

FEME COVERTE.

See HUSBAND AND WIFE. MARRIAGE SETTLEMENT. PROTECTOR OF A SETTLEMENT. SEPARATE PROPERTY.

FINES AND RECOVERIES.

The court of chancery is not the protector of a settlement, where the tenant for life is a married woman whose husband has been convicted of felony, and the life estate is not settled to her separate use. *In re Wainewright*, 352

FORECLOSURE.

If a mortgagee of leaseholds, before he files a bill of foreclosure, is under the necessity of citing the next of kin of the deceased mortgagor, before the Ecclesiastical Court, in order to compel them to take out administration to the deceased; this Court will not allow him the costs of the citation, unless he states his case for them, on his bill. *Ward* v. *Barton*, 534

FOREIGN LAW.

A. and B. were Spanish subjects, resident in Spain. A. having entered into a mercantile contract with the Spanish government, agreed with B., to allow him a share of the profits. Some years afterwards B. died, and A. went, first, to France, and afterwards came to England. After he had left Spain, he frequently wrote to the plaintiffs, (who were resident in France, but had taken out administration to B. in this country,) promising to settle with them for B.'s share of the profits of the contract; but not having done so, they filed a bill against him to enforce the agreement. A. pleaded that the agreement was illegal and void by the laws of Spain, as, at the time it was entered into, B. held an office of trust and confidence under the Spanish government: and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties and a criminal prosecution. It was objected, first, that the plea was double, as the first part applied to the discovery and relief, and the latter part, to the discovery only: secondly, that the particular law of Spain by which the agreement was nullified, ought to have been set forth; thirdly, that B. was dead, and, therefore, no longer subject to pains and penalties; and, fourthly, that A., after he had left Spain, had recognised the agreement and promised to perform it. The court, however, allowed the plea. *Heriz* v. *Riera*, 318

FRAUD.

See JOINT STOCK COMPANY.

HEIR AND EXECUTOR.

1. Testator, after reciting that his property consisted of a house at C., (which was freehold,) and of mortgages, &c., directed the house to be sold; and then gave several pecuniary legacies, and amongst them, 300*l.* to G., and 100*l.* to P., whom he appointed his executors. The will concluded thus: "and to Mr. G., who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled." G. died the day after the testator, without having proved the will. Held,

in a suit by his executors against the testator's heir and next of kin, that the plaintiffs were entitled to the residue of the testator's estate, including the proceeds of the house. *Griffiths* v. *Pruen*, 202

2 If an executor is also the residuary legatee, he is entitled to the residue, although he does not prove the will. *id*

See CONVERSION.

HOTCHPOT CLAUSE.

Under a marriage settlement, a sum of consols was held in trust for the husband for life, remainder, as to a certain portion of it, for the wife for life, remainder for such one or more of the children as the husband and wife should appoint, remainder for the children at 21; and, as to the rest of the consols, in trust, after the husband's death, for the children, absolutely, at 21. There were five children who attained 21. Their parents, conceiving that they had power to appoint the whole of the consols, made appointments, at different times, to two of them, which more than exhausted that portion of the consols which was appointable. Each deed of appointment declared that the appointee should not be entitled to any further or other share in the trust fund under the settlement, until he should have put in hotchpot the thereby appointed share; unless a contrary intention should be expressed in the instrument by which any further appointment should be made. Held, that, though the appointable part of the consols was not sufficient to answer fully, the second appointment, yet there was to be no apportionment, and that the second appointee as well as the first, was prevented, by the hotchpot clause, from taking any part of his one-fifth of the unappointable consols, unless he would give up the whole of what he would get under the appointment; and that the unappointable consols belonged, wholly, to the three other children. *Warde* v. *Firmin*, 235

HUSBAND AND WIFE.

1. A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other, to a trustee for her, married. The mortgagees having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred. Held, that he had reduced both sums into possession. *Rees* v. *Keith*, 388

2. A married woman who had left her husband and was living separate from him, but not in a state of adultery, held to be entitled to a settlement out of a sum of stock, to which her husband had become entitled in her right. *Eedes* v. *Eedes*, 569

IMPLIED POWER.

Testator, after directing all his just debts to be paid, gave his personal estate and a freehold house, of which he was seised in fee, to his wife for life, with liberty to sell it, in case a good offer should be made, and to invest the proceeds, in the funds, for her benefit during her life; and he directed that, at his wife's death, the house, if not previously sold, should be sold, (but without saying by whom,) and that the proceeds, together with his personal estate, should be divided amongst the children of his brother and sister; and he appointed his wife his executrix, and requested J. H. F. and R. C., jointly with her, to become the executors and trustees of his will. J. H. F. and the testator's widow, proved the will. R. C. died in the lifetime of J. H. F. and the widow, without having proved it. The widow died 25 years after the testator. Held, that J. H. F. had power to sell the house, and to give a receipt for the purchase-money. *Forbes* v. *Peacock*, 152

INDEMNITY.

Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The executor and trustee of the will had never been in possession of the estates. Held, nevertheless, that he was entitled to be indemnified in respect of the rents and covenants. *Cochrane* v. *Robinson*, 378

INFANT.

1. Four co-partners purchased an estate out of the partnership assets, and took a conveyance themselves as tenants in common in fee. One of them died intestate as to his real estates, leaving an infant heir. The survivors settled, with his executors, for the value of one-fourth of the estate, and then petitioned, under the 11 Geo. 4, and 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join

in conveying the estate to a purchaser. The court refused to make the order, and said that a bill must be filed. *Ex parte Williams*, 54

2. A., on his son's marriage, vested certain funds in trustees, in trust, after the deaths of himself and his son, for the daughters of the marriage at the usual periods, and, in the mean time, to apply the income of each daughter's share, or so much thereof as the trustees should think proper, for her maintenance and education. The son died, leaving an only daughter, an infant. Her mother married again. The infant, to whom no guardian was appointed, was maintained and educated by her mother and step-father; and A. paid them, first, 200*l.*, and afterwards 300*l.* a year, on the infant's account; and, upon A.'s death, his widow continued to pay the 300*l.* a year, and received the income of the trust funds for her own benefit, conceiving that she was entitled so to do under A.'s will. The infant being about to be married, the settlement was referred to; and it was then discovered that the income of the trust funds amounted to 800*l.* a year. Whereupon the mother and her second husband, who had expended much more than the 300*l.* a year in the infant's maintenance and education, filed a bill against A.'s widow and the trustees (but without making the infant or her husband parties,) in order to recover their extra expenditure. The trustees admitted that the extra expenditure had been properly incurred, and that they should have increased the allowance for the infant, had they been applied to. The court directed the master to inquire what was proper to be allowed, to the plaintiffs, for the infant's maintenance and education, from A.'s death until the infant's marriage. *Stopford* v. *Lord Canterbury*, 82

3. The father of infants, before a petition was presented, by their mother, for access to them, &c., under 2 & 3 Vict. c. 54, went, with them, to reside abroad. The court ordered substituted service of the petition, but, at the hearing, declined to make the order, (although the father had filed affidavits and appeared by counsel,) because the father and infants were resident abroad, and because a suit, by the mother, for restitution of conjugal rights, was pending, which, if successful, would have the same effect as the order prayed. The court will not make the order, where the wife has left her husband without sufficient cause. *Semble*, that the order may be made *ex parte*, if the necessity of the case requires it. *In re Taylor*, 178

4. The court will not remove a next friend, merely because he is nearly related to or connected with the defendant: but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain. *Bedwin* v. *Asprey*, 530

See COSTS, 1. NEXT OF KIN, 1. TRUST. WARD OF COURT.

INFANT TRUSTEE.

See INFANT, 1.

INFORMATION AND BILL.

An information and bill was filed, to set aside a long lease of premises vested in the Coopers' Company for charitable purposes. The plaintiffs were three members of the court of assistants of the company (who alleged that they acted as trustees of the charity,) and an almsman and almswoman, who were objects of the charity. A general demurrer to the information and bill was allowed, as no relief was prayed with respect to the plaintiffs individually. But leave was given to amend the record, by making it an information only. *Attorney-General* v. *East India Company*, 380

INJUNCTION.

1. The defendants published a work containing an original essay on modern English poetry, biographical sketches of 43 modern poets, and selections from their poems, amongst which were six short poems and parts of longer poems, the copyright whereof belonged to the plaintiff. The selections constituted, altogether, the bulk of the defendants' work; but were alleged to have been introduced into it for the purpose of illustrating the essay. The court restrained the publication of the defendants' work as being an infringement of the plaintiff's copyright. *Campbell* v. *Scott*, 31

2. The lessee of an inn covenanted to use and keep it open as an inn, during the term, and not to do any act whereby the licenses might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant, the lessor obtained an *ex parte*

injunction, restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licenses might become forfeited or be refused. But the injunction was afterwards dissolved, the court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same, in effect, as ordering him to keep an inn; and no intention having been shown on the part of the defendant to violate the negative part of the covenant. *Hooper* v. *Brodrick*, 47

3. Where a party seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated; although, he does not claim copyright in all the passages which are the same in both works. *Sweet* v. *Maugham*, 51

4. Where an injunction restraining an infringement of copyright, is continued, subject to the plaintiff bringing an action, the court will not allow the defendant to continue the sale of his work, he keeping an account, unless the plaintiff will consent. *id*

5. The defendant being in contempt for want of appearance, the common injunction was extended to stay trial on a motion made without notice. *Harrison* v. *Dixon*, 123

6. If officers of a corporation are made co-defendants to a bill for a discovery and an injunction to stay an action brought by the corporation, the injunction will be dissolved on the coming in of the answer of the corporation, although the officers have not answered. *Glasscott* v. *Copper Miners' Company*, 314

See CREDITOR. LITERARY PROPERTY.

INQUIRIES.

See PRELIMINARY ACCOUNTS AND INQUIRIES.

INSOLVENT.

1. Although, on the death of the assignee of an insolvent's estate, any creditor of the insolvent may get a new assignee appointed by the insolvent debtors' court, and all the insolvent's property which was vested in the deceased, will immediately thereupon become vested in the new assignee, yet, where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the executors of the deceased assignee. *Fulcher* v. *Howell*, 100

2. An insolvent debtor and his wife conveyed estates belonging to the latter, to trustees, to raise and pay 35,000*l.* to the assignees (who were parties to the deed,) for the benefit of the creditors. The insolvent died before that sum was raised; and, after his death, the assignees made a compromise with his widow, by which they agreed to accept, from her, a smaller sum. One of the creditors filed a bill against the assignees, the trustees and the widow, charging them with collusion, and praying that the trusts of the conveyance might be performed, and that the defendants might be restrained from carrying the compromise into effect. A demurrer, by the assignees, for want of equity, was allowed; as the plaintiff ought to have applied to the insolvent debtor's court, to remove the assignees. *Yewens* v. *Robinson*, 105

See POLICY OF INSURANCE.

INSUFFICIENCY.

A., B. and C. were members and three of the directors of a mining company, and also lessees, in trust for the company, of mines in Nova Scotia, under a lease by which a portion of the profits was reserved to the lessor. The lessor's executors filed a bill against A., B. and C., for an account of the profits of the mines, and required them to set forth a list of all accounts, &c., relating to the mines, in the possession of them or their agents. The defendants set forth a list of all the accounts in the possession of themselves and of the secretary of the company in London, adding that there were other accounts in the possession of the company's agent in America; that the defendants had no power to inspect or use the accounts of the company, except when sitting at the board of directors, or by an order of the board; and that they had not the permission of the board to use the accounts for the purposes of the suit, and they believed that the directors declined to allow them to use the same, or to give them any further information which might enable the plaintiffs to prosecute the suit. Held that the answer was insufficient, as it did not state that the defendants had (as they lawfully

might) applied to the agent in America for a list of the accounts in his possession. *Taylor* v. *Rundell*, 391

See ANSWER. DEFENDANT, 2, 3, 4.

INTEREST.

Under 1 & 2 Vict. c. 110, s. 17 & 18, interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate. *Attorney-General* v. *Nethercote*, 529

See INTERPLEADER, 2.

INTERMEDIATE RENTS.

T. settled his estates (subject to a general power of appointment in himself.) on himself in tail, remainder to J. L. and his sons in strict settlement, remainder to L. C. for life, &c.: provided that if J. L., or any issue male of his body should become entitled, in possession, to his father's family estates, then the uses before declared of T.'s estates, for the benefit of him or them who should so become entitled; and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled, were dead without issue male. T., by his will, appointed his estates to J. H. L. (the eldest son of J. L.) and his sons in strict settlement, remainder to the heir of H. H. deceased: provided that if any tenant for life in possession under the will, should become entitled, in possession, to J. L.'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator then gave all the rest and residue of his real and personal estates, to A. H. S., his executors, &c. J. L. became entitled in possession to his father's family estates in the testator's life. The testator died in 1824; upon which, J. H. L. entered upon his estates under the will. J. L. died in 1833, upon which J. H. L. became entitled in possession to the family estates. He had no son. The rents of T.'s estates, accruing between 1833 and J. H. L.'s death, or his having a son, were claimed by A. H. S. as being appointed to him by the residuary clause: and L. C. and H. L. (the second son of J. L.) claimed them, adversely to each other, under the limitations, in default of appointment, in T.'s settlement. The court decided against A. H. S.'s claim; and, at the request of counsel, sent a case to law, as to the claims of L. C. and H. L., notwithstanding the legal interest in T.'s estates was vested in trustees, and the court had very little doubt upon the question. *Morrice* v. *Langham*, 260

INTERPLEADER.

1. Where a bill of interpleader is filed by the officer of a company, on behalf of the company, the affidavit annexed, ought to state, not that the plaintiff does not collude, but that, to the best of his knowledge and belief, the company do not collude with the defendants. *Bignold* v. *Audland*, 23

2. Where a bill of interpleader is filed respecting a sum of money on which interest is recoverable, at law, under 3 & 4 Will. 4, c. 42, s. 28, the plaintiff ought to offer, by his bill, to pay the interest. *id*

3. A., having in his hands a sum of money, which B. and C. claimed adversely to each other, filed a bill, against them, praying that they might interplead respecting the sum. The bill also sought the decision of the court as to a claim, made by B., to interest on the sum, and raised a question as to the costs of an action which B. had brought to recover the sum. Held that the bill was not sustainable as a bill of interpleader, and that it was multifarious. *id* 24

4. A., an architect and surveyor, brought an action against B., his employer, for 155*l*., the amount of a running account between them; one item of which was 76*l*., which A. had paid to D. by the direction of C., to whom it was due for plumber's work, done for B. C. having taken the benefit of the insolvent debtors' act, his assignee demanded the 76*l*. of B., insisting that the payment to D. was invalid. B. paid into court in the action 79*l*., being the 155*l* minus 76*l*. A. took the 79*l* out of court, and proceeded with his action. B. then filed a bill of interpleader against A. and C.'s assignee, respecting the 76*l*. Held that the bill was not sustainable. *Glyn* v. *Duesbury*, 139

ISSUE.

1. Although a court of equity would have been satisfied if the opinion on a

case, or the verdict on an issue directed by it, had been the reverse of what it is; yet it is not the duty of the court to direct another case or another issue, unless it sees that the opinion or the verdict is clearly wrong. *Northam Bridge Company* v. *Southampton Railway Company*, 42

2. The court, on an interlocutory application, will direct a reference or issue, to ascertain a fact on which the title of the parties depends. Whether the parties ought to be bound by the finding, at the hearing of the cause: *Qu. Kent* v. *Burgess*. 361

J.

JOINT STOCK COMPANY.

Pending a bill in parliament for forming a dock company, certain subscribers to the undertaking, subscribed for 9,000 additional shares, in order to make up the amount of capital required by the standing orders of the house of lords, before the bill could pass that house. Afterwards, but before the bill was passed, those persons signed a declaration that they held the additional shares in trust for the company. After the bill had passed, a meeting of the company resolved unanimously that the trust should be annulled and the shares be transferred to the secretary, for the use of the company: no transfer, however, was made. The directors having made calls, it was held that the subscribers for the additional shares, were bound, as trustees, to pay the calls in respect of those shares. *Preston* v. *Grand Collier Dock Company*, 327

See INTERPLEADER, 1.

JOINT TENANTS.

See WILL, 7.

JURISDICTION.

2. An insolvent debtor and his wife conveyed estates belonging to the latter, to trustees, to raise and pay 35,000*l.* to the assignees (who were parties to the deed,) for the benefit of the creditors. The insolvent died before that sum was raised; and, after his death, the assignees made a compromise with his widow, by which they agreed to accept, from her, a smaller sum. One of the creditors filed a bill against the assignees, the trustees and the widow, charging them with collusion, and praying that the trusts of the conveyance might be performed, and that the defendants might be restrained from carrying the compromise into effect. A demurrer, by the assignees, for want of equity, was allowed; as the plaintiff ought to have applied to the insolvent debtors' court, to remove the assignees. *Yewens* v. *Robinson*, 105

2. A cause set down before the Vice-Chancellor of England, was ordered to be transferred to another branch of the court. Held that the Vice-Chancellor of England had, nevertheless, jurisdiction to hear a petition in the cause, presented before the order of transfer was made. *Hills* v. *Hills*, 571

See COVENANT.

L.

LEASEHOLDS.

Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The executor and trustee of the will had never been in possession of the estates. Held, nevertheless, that he was entitled to be indemnified in respect of the rents and covenants. *Cochrane* v. *Robinson*, 378

LEGACIES.

Testator, by his will, after devising his real estates, and giving pecuniary legacies, directed his debts, funeral and testamentary expenses, and the legacies *thereby* given, to be paid as soon as conveniently might be after his death: "And I charge my debts and legacies on my real and personal estate." By a codicil he gave to A. and B. a sum of stock, and directed the trustees and executors of his will (who were the same persons) to purchase and transfer the stock to A. and B., in trust for C. for life; and, subject thereto, in trust to permit the same to *return to* and become part of his personal estate. Held that the charge in the will, extended to the legacy given by the codicil. *Roake* v. *Worrall*, 216

See CHARGE OF DEBTS AND LEGACIES. LEGACY-DUTY. WILL, 2.

LEGACY-DUTY.

Testator directed his executors to set apart a sum, not more than 7,500*l*, the dividends of which, when invested, as after directed, would amount to or produce the clear yearly sum of 300*l*, clear of all deductions whatsoever, and to invest the sum so to be set apart, in government or other securities; and he directed that if, at any time, the dividends of the trust moneys should, from any cause whatsoever, prove insufficient to answer the purposes aforesaid, the trustees should, out of the residue of the moneys that should come to their hands, raise such further sum as should be sufficient to make good any deficiency, and apply the same accordingly, and he gave the annuity to the plaintiff for life. Held that the annuity was free of legacy-duty. *Marris* v. *Burton*, 161

LIABILITY OF SHAREHOLDERS.

Pending a bill in Parliament for forming a dock company, certain subscribers to the undertaking, subscribed for 9,000 additional shares, in order to make up the amount of capital required by the standing orders of the house of lords, before the bill could pass that house. Afterwards, but before the bill was passed, those persons signed a declaration that they held the additional shares in trust for the company. After the bill had passed, a meeting of the company resolved unanimously that the trust should be annulled and the shares be transferred to the secretary, for the use of the company; no transfer, however, was made. The directors having made calls, it was held that the subscribers for the additional shares, were bound, as trustees, to pay the calls in respect to those shares. *Preston* v. *Grand Collier Dock Company*, 327

LIBEL.

See ADVERTISEMENT.

LIEN.

G., a publican, agreed to sell his public-house (which M. & Co. supplied with beer) to A. A. being unable to pay the whole purchase-money, M. & Co., at his request, agreed to pay to G. 1,000*l*, part of it. At a meeting of the parties for completing the purchase, M. & Co. paid the 1,000*l* to G. G. then executed the conveyance of the house, and, *immediately afterwards*, *delivered it to M. & Co.*; and A. signed a memorandum expressing that he had deposited the deed with M. & Co., for securing, by way of equitable mortgage, the payment to them of the 1,000*l*. Shortly afterwards, M. & Co. discovered that A. was an uncertificated bankrupt. Held, nevertheless, that they had, as against A.'s assignees, a lien on the deed for the 1,000*l*. *Meux* v. *Smith*, 410

See SHIP.

LITERARY PROPERTY.

Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work. *Seeley* v. *Fisher*, 581

See COPYRIGHT.

LUNATIC.

Testator gave, to his wife, all his goods, chattels, and personal estate whatsoever, and charged his real estates with the payment of his funeral and testamentary expenses and debts, and exempted his personal estate from the payment thereof. He then gave pecuniary legacies to two of his children, and charged his real estate with the payment of them; and directed that, during the minority of the legatees, his trustees, their heirs and assigns, should raise, out of the rents of his real estate, or by any other means they might deem expedient, annual sums for the maintenance of the legatees, not exceeding four *per cent. per annum*, upon their respective legacies. Some years afterwards, the testator was found a lunatic; and, by an order in the lunacy, 4,250*l*. was allowed, yearly, for the maintenance of him and his family; and such allowance was to be made from the 6th of April, 1834, and to be continued, from time to time, until further order, and to be paid, to his wife, by the committees of his estate, out of the rents and profits thereof. The testator died on the 6th of October, 1839. His wife had received all that was due in respect of the allowance down to the 6th of April, 1839, but nothing afterwards. She claimed, under his will, his personal estate, including the rents of his real es-

tates due at his death, free from the payment of his funeral and testamentary expenses, debts and legacies; and she also claimed one moiety of the 4,250*l.* for the last six months of the testator's life, and insisted that it ought to be raised, as a debt, out of the real estates. Held that the funeral and testamentary expenses, debts and legacies were payable out of the real estates only, and that the widow was entitled to the whole of the personal estate, including the arrears of rent; but that she was not entitled to the moiety of the 4,250*l.*, that sum being payable only out of the rents, and there being, in consequence of her claim before mentioned, no rents to pay it with. *Jones* v. *Bruce*, 221

M.

MAINTENANCE.

1. A., on his son's marriage, vested certain funds in trustees, in trust, after the deaths of himself and his son, for the daughters of the marriage at the usual periods, and, in the mean time, to apply the income of each daughter's share, or so much thereof as the trustees should think proper, for her maintenance and education. The son died, leaving an only daughter, an infant. Her mother married again. The infant, to whom no guardian was appointed, was maintained and educated by her mother and step-father; and A. paid them, first, 200*l.*, and afterwards 300*l.* a year, on the infant's account; and, upon A.'s death, his widow continued to pay the 300*l.* a year, and received the income of the trust funds for her own benefit, conceiving that she was entitled so to do under A.'s will. The infant being about to be married, the settlement was referred to; and it was then discovered that the income of the trust funds amounted to 800*l.* a year. Whereupon the mother and her second husband, who had expended much more than the 300*l.* a year in the infant's maintenance and education, filed a bill against A.'s widow and the trustees (but without making the infant or her husband parties,) in order to recover their extra expenditure. The trustees admitted that the extra expenditure had been properly incurred, and that they should have increased the allowance for the infant, had they been applied to. The court directed the master to inquire what was proper to be allowed, to the plaintiffs, for the infant's maintenance and education, from A.'s death until the infant's marriage. *Stopford* v. *Lord Canterbury*, 82

2. By a marriage settlement, sums of stock, the wife's property, were settled in trust for the husband during the joint lives of himself and his wife; with remainder to the survivor for life; and it was declared that, if the husband should survive and marry again, and there should be issue of the marriage then living, his life interest in a moiety of the funds should cease, and that moiety should *be transferred to the same persons, and be applied to the like purposes, and in the like manner*, as it would be transferable and applicable to *if the husband were dead*. Then followed trusts of the funds for the children as the husband and wife should jointly appoint, and as the survivor should appoint; and, in default of any appointment, for all the children, (*except an eldest or only son, who, for the time being, should become entitled, in possession or remainder, to the husband's real estates*, under a deed of even date,) the shares to be vested in the children at the usual periods, *but not to be transferred until the death of the surviving parent*. And it was declared that, *after the death of both parents*, the trustees should apply so much as they should think fit, of the income of each child's share, until its share should become transferable, for its maintenance, and should accumulate the surplus: and the trustees were empowered, after the death of both parents, to advance the children, out of the capital of their shares, notwithstanding they should be under 21. The wife died. There was issue of the marriage, four sons and three daughters, all infants. The husband appointed part of the funds to his eldest son, and then married again. The court refused to direct (without a reference as to the husband's ability) the income of the moiety of the funds which the husband forfeited by marrying again, to be applied for the children's maintenance, there being, in consequence of the exception of an eldest or only son, &c., a suspension of the trust for the benefit of the children, during the father's lifetime. *Kekewich* v. *Langston*, 291

See TRUST.

MARKSMAN.

A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file. —— v. *Ohristopher*, 409

MARRIAGE ABROAD.

A marriage between a British subject domiciled in England, and a female ward of court, was celebrated, in the presence of the British consul and in the English church at Antwerp, by a clergyman of the Church of England, who had been appointed chaplain to the church, and was paid by the British government. Held that the marriage was invalid, as certain ceremonies prescribed by the law of Belgium had not been observed. *Kent* v. *Burgess*, 361

MARRIAGE SETTLEMENT.

On a marriage of a female ward, her fortune, consisting of *choses in action*, was settled, with the sanction of the court, in trust for her husband and herself for their lives, with remainder for their children, with remainder for her absolutely, if she survived her husband; but if not, then *as she should appoint by will, with remainder for her next of kin*. Some years afterwards, the marriage, of which there was no issue, was dissolved by act of parliament. After which the husband released, all his right and interest under the settlement, to the wife. Held that the settlement was not binding on the wife, and that she was at liberty to re-settle her property on her second marriage. *Hastings* v. *Orde*, 205

MASTER.

See PRACTICE, 8.

MEETING-HOUSE.

See CHAPEL.

MINE.

The owner of nearly one half the shares in a valuable mine in Cornwall, (which was divided into 1,624 shares,) having become bankrupt, his assignee and the other shareholders agreed, without the consent of the creditors, to dispose of his shares amongst themselves and their friends; and, in order to effect that object, they arranged that the mine should be sold under a decree of the vice-warden of the Stannaries, in an amicable suit to be instituted by a creditor of the mine against the then shareholders; that the mine should be re-purchased by the assignee at a certain sum, and that a new company should be formed, consisting of the old and new shareholders. The bankrupt's shares were disposed of accordingly, the assignee and the old shareholders having agreed to take some of them, H. and T. to take another jointly; and certain other persons, the remainder. Afterwards it was agreed that the shares in the mine should be altered to 54th shares. The decree was then obtained, and the mine sold and re-purchased as had been arranged. H. and T. then agreed to sever their share. The creditors having discovered the circumstances under which the bankrupt's shares had been disposed of, the assignee was removed, and the plaintiff appointed in his place. The plaintiff filed a bill against H. alone, alleging that H. and all the other shareholders had notice of the circumstances before mentioned, and praying that H. might transfer her share to him, and account for and pay to him the profits thereof, and that a receiver might be appointed of the *profits of the mine*. Held that "the profits of the mine," must be taken to mean the profits of the share sought to be recovered; and that none of the other shareholders were necessary parties to the bill. *Turner* v. *Hill*, 1

MISNOMER.

Testator devised his estates to the second son of Edward Weld, of Lulworth, Esq., for his life, with remainders to his sons, successively, in tail male, with like remainders to the third and other sons (*except the eldest*) of the said Edward Weld, and their sons, with remainders to the first and other sons of each brother (*except the eldest brother*) of the said Edward Weld, successively, in tail male, with remainders to the second and other sons (except the eldest) of Lady Stourton, one of the sisters of the said Edward Weld, successively, in tail male. The will was dated in 1834, and the testator died in 1837. There was not, either at the date of the will or at the testator's death, any such person as Edward Weld of Lulworth: but it appeared, from evidence as to the state of the Weld family, that Joseph Weld was then the possessor of Lulworth; that he had *an elder brother* named Thomas, and had had another brother, Edward, older than himself, who died a bachelor in 1796; that he had two sons, Edward Joseph, his eldest, and Thomas, his second son; and that Lady Stourton was his sister. The question was, whether the second son of Joseph, or of Edward, or of Edward Jo-

seph, was intended to be the object of the first devise. The Court decided in favor of the second son of Joseph. *Blundell* v. *Gladstone*, 467

MISTAKE.

See APPOINTMENT, 1. MISNOMER.

MORTGAGE.

See SHIP.

MORTGAGOR AND MORTGAGEE.

If a mortgagee of leaseholds, before he files a bill of foreclosure, is under the necessity of citing the next of kin of the deceased mortgagor, before the Ecclesiastical Court, in order to compel them to take out administration to the deceased; this Court will not allow him the costs of the citation, unless he states his case for them, on his bill. *Ward* v. *Barton*, 534

MULTIFARIOUSNESS.

1. A. having in his hands a sum of money, which B. and C. claimed adversely to each other, filed a bill, against them, praying that they might interplead respecting the sum. The bill also sought the decision of the court as to a claim, made by B., to interest on the sum, and raised a question as to the costs of an action which B. had brought to recover the sum. Held that the bill was not sustainable as a bill of interpleader, and that it was multifarious. *Bignold* v. *Audland*, 24

2. A., B., C. and D. were co-partners. A. and B. died, and soon afterwards C. and D. became bankrupt. M., who was a creditor of the firm at the deaths of A. and B., and at the bankruptcy, filed a bill, on behalf of himself and all the other creditors of A. and B., against the executors (who however had not proved) and devisees of both A. and B., and the assignees of the bankrupts, for the purpose of having the real and personal assets of both A. and B. applied in payment of their joint and separate debts. Held that the administration of the two estates might be comprised in one suit, and, therefore, a demurrer for multifariousness, was overruled. An objection, however, made *ore tenus*, that no properly constituted personal representatives of A. and B. were parties, was allowed: but the court did not give the plaintiff the costs of the demurrer on the record, but merely allowed the demurrer *ore tenus*, without costs. *Drown* v. *Douglass*, 283

N.

NE EXEAT.

A *ne exeat* will not be granted unless it is prayed for by the bill. *Sharp* v. *Taylor*, 50

NEW ORDERS.

See CREDITOR.

NEW TRIAL.

See ISSUE, 1.

NEXT FRIEND.

The court will not remove a next friend, merely because he is nearly related to or connected with the defendant: but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain. *Bedwin* v. *Asprey*, 530

NEXT OF KIN.

On a marriage of a female ward, her fortune, consisting of *choses in action*, was settled, with the sanction of the court, in trust for her husband and herself for their lives, with remainder for their children, with remainder for her absolutely, if she survived her husband; but if not, then *as she should appoint by will, with remainder for her next of kin*. Some years afterwards, the marriage, of which there was no issue, was dissolved by act of parliament. After which the husband released, all his right and interest under the settlement, to the wife. Held that the settlement was not binding on the wife, and that she was at liberty to re-settle her property on her second marriage. *Hastings* v. *Orde*, 205

NOTICE.

See ADVANCING CAUSE. POLICY OF INSURANCE.

O,

OFFICE-COPIES.

The clerk of records and writs is not compellable to file the answer of a defendant who has refused to take an office-copy of the bill. *Aked* v. *Aked*, 437

ORDER AND DISPOSITION.

All the assured in the equitable assurance office are partners in the society; and, therefore, express notice of an assignment of a policy effected with that society, need not be given, in order to take the policy out of the order and disposition of the assignor. The report of *Bozon* v. *Bolland*, in 1 Mont. & Bligh's reports, corrected. *Duncan* v. *Chamberlayne*, 123

P.

PARENT AND CHILD.

See INFANT, 3. PRACTICE, 7.

PARTIES.

The owner of nearly one half the shares in a valuable mine in Cornwall, (which was divided into 1,624 shares,) having become bankrupt, his assignee and the other shareholders agreed, without the consent of the creditors, to dispose of his shares amongst themselves and their friends; and, in order to effect that object, they arranged that the mine should be sold under a decree of the vice-warden of the Stannaries, in an amicable suit to be instituted by a creditor of the mine against the then shareholders; that the mine should be re-purchased by the assignee at a certain sum, and that a new company should be formed, consisting of the old and new shareholders. The bankrupt's shares were disposed of accordingly, the assignee and the old shareholders having agreed to take some of them, H. and T. to take another jointly; and certain other persons, the remainder. Afterwards it was agreed that the shares in the mine should be altered to 54th shares. The decree was then obtained, and the mine sold and re-purchased as had been arranged. H. and T. then agreed to sever their share. The creditors having discovered the circumstances under which the bankrupt's shares had been disposed of, the assignee was removed, and the plaintiff appointed in his place. The plaintiff filed a bill against H. alone, alleging that H. and all the other shareholders had notice of the circumstances before mentioned, and praying that H. might transfer her share to him, and account for and pay to him the profits thereof, and that a receiver might be appointed of the *profits of the mine*. Held that "the profits of the mine," must be taken to mean the profits of the share sought to be recovered; and that none of the other shareholders were necessary parties to the bill. *Turner* v. *Hill*, 1

2. Where a bill has been dismissed for want of prosecution against a defendant, who, at the hearing, is held to be a necessary party; the court will not allow the plaintiff to bring him before the court again, by supplemental bill, but will dismiss the bill with costs. Affirmed in 1843. *Lautour* v. *Holcombe*, 71

3. A., B., C. and D. were co-partners. A. & B. died, and soon afterwards C. and D. became bankrupt. M., who was a creditor of the firm at the deaths of A. and B., and at the bankruptcy, filed a bill, on behalf of himself and all the other creditors of A. and B., against the executors (who however had not proved) and devisees of both A. and B, and the assignees of the bankrupts, for the purpose of having the real and personal assets of both A. and B. applied in payment of their joint and several debts. Held that the administration of the two estates might be comprised in one suit, and, therefore, a demurrer for multifariousness, was overruled. An objection, however, made *ore tenus*, that no properly constituted personal representatives of A. and B. were parties, was allowed: but the court did not give the plaintiff the costs of the demurrer on the record, but merely allowed the demurrer *ore tenus*, without costs. *Brown* v. *Douglass*, 283

4. A bill by a member of a numerous incorporated company, *on behalf of himself and all the other members*, except the defendants, praying that a transaction in which the defendants had been the actors, but which had been sanctioned, *unanimously*, at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members on whose behalf the bill was filed, had been present and voted at the meeting. *Preston* v. *Grand Collier Dock Company*, 327

See CHARITY, 1. INFANT, 2. INSOLVENT, 1. PLEA AND PLEADING, 3.

PARTITION.

A bill in equity will not lie for a partition of copyholds. *Horncastle* v. *Charlesworth*, 315

PARTNERSHIP.

Two brothers, A. and B., entered into co-partnership, without articles, and purchased land for the purposes of their trade, with money borrowed from C., and had the land conveyed to themselves in moieties, to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir. B. then took D. into partnership. Each of the firms erected trade buildings on the land, and paid for them and for the insurance on them, and also paid the interest on the mortgage-money out of their partnership funds. Ultimately, B. and D. paid off the mortgage out of their partnership property, and took a re-conveyance of the land to themselves as joint tenants in fee. B. died, and his heir, who was also the heir of A., claimed the land; but the court held that it was converted into personalty, and dismissed the bill. *Houghton* v. *Houghton*, 491

PERSONAL ESTATE.

See ACCOUNTS, 2.

PERPETUATION OF TESTIMONY.

See BILL TO PERPETUATE TESTIMONY.

PIRACY.

See COPYRIGHT.

PETITION.

See TRANSFER OF CAUSE.

PLAINTIFF.

See VOLUNTARY DEED.

PLEA AND PLEADING.

1. Where a bill of interpleader is filed respecting a sum of money on which interest is recoverable, at law, under 3 & 4 Will. 4, c. 42, s. 28, the plaintiff ought to offer, by his bill, to pay the interest. *Bignold* v. *Audland*, 23

2. A defendant at law may file a bill of discovery, not only to sustain his defence to the action, but to rebut the evidence in support of it. *Glasscott* v. *Copper Miners' Company*, 305

3. The rule that officers of a corporation may be made co-defendants to a bill against the corporation, applies to a bill for discovery as well as to a bill for relief; and members of the corporation may be joined with the officers. *id*

4. A. and B. were Spanish subjects, resident in Spain. A. having entered into a mercantile contract with the Spanish government, agreed with B., to allow him a share of the profits. Some years afterwards B. died, and A. went, first, to France, and afterwards came to England. After he had left Spain, he frequently wrote to the plaintiffs, (who were resident in France, but had taken out administration to B. in this country,) promising to settle with them for B.'s share of the profits of the contract; but not having done so, they filed a bill against him to enforce the agreement. A. pleaded that the agreement was illegal and void by the laws of Spain, as, at the time it was entered into, B. held an office of trust and confidence under the Spanish government: and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties and a criminal prosecution. It was objected, first, that the plea was double, as the first part applied to the discovery and relief, and the latter part, to the discovery only: secondly, that the particular law of Spain by which the agreement was nullified, ought to have been set forth; thirdly, that B. was dead, and, therefore, no longer subject to pains and penalties; and, fourthly, that A., after he had left Spain, had recognised the agreement and promised to perform it. The court, however, allowed the plea. *Heriz* v. *Riera*, 318

5. A bill by a member of a numerous incorporated company, *on behalf of himself and all the other members* except the defendants, praying that a transaction in which the defendants had been the actors, but which had been sanctioned, *unanimously*, at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members on whose behalf the bill was filed,

had been present and voted at the meeting *Preston* v. *Grand Collier Dock Company*, 327

See AFFIDAVIT, 1. CHARITY, 1. COPYRIGHT, 2, 3. FORECLOSURE. INTERPLEADER, 1, 2, 3. PARTIES, 1, 3. PRACTICE, 13. VOLUNTARY DEED.

POLICY OF INSURANCE.

All the assured in the Equitable Assurance office are partners in the society; and, therefore, express notice of an assignment of a policy effected with that society, need not be given, in order to take the policy out of the order and disposition of the assignor. The report of *Bozon* v. *Bolland*, in 1 Mont. & Bligh's Reports, corrected. *Duncan* v. *Chamberlayne*, 123

PORTIONS.

Estates were settled on A. for life, remainder to trustees, for 1,000 years, to raise 5,000*l.* for the portions of his daughters and younger sons, and, subject thereto, to A. in fee: provided that, if A., in his lifetime or by his will, should give to any of his children entitled to portions under the trusts of the term, any sum of money, &c., for or towards their advancement in marriage or otherwise, the same should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child; unless A. should, by writing under his hand, declare to the contrary. A. had eight daughters and two younger sons. By his will, after reciting the limitations and trusts of the settlement, he devised the estates, subject to the 5,000*l.*, to trustees in trust, by sale or mortgage, to raise money to supply the deficiency of his personal estate for payment of his debts and legacies, and, in the next place, to pay 2,000*l.* to each of his younger sons; and he declared that, after payment of his debts and legacies, and the sums of 2,000*l.*, the estates, or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made, by the trustees, in pursuance of the power thereinbefore given to them for that purpose,) should go to his eldest son. Held that the will did not contain anything that was equivalent to a declaration that the legacies of 2,000*l.* should not be a satisfaction for the portions of the two younger sons, and, consequently, that they were not entitled to their legacies, and also to their shares of the 5,000*l.* *Papillon* v. *Papillon*, 643

POWER.

Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support and benefit of his three children and the survivors and survivor of them, in such shares and proportions, and in such manner as they should think most proper and advisable; and, if all the children should die without leaving issue, then that the trust fund should remain vested in two of the trustees, in trust for the persons thereinafter mentioned. Held that *the whole* income of the residue was given for the children's benefit, and, the trustees having applied only part of it for their benefit, that the surplus devolved, on the survivor's death, to his personal representative. *Beevor* v. *Partridge*, 229

POWER OF SALE.

1. Testator, after directing all his just debts to be paid, gave his personal estate and a freehold house, of which he was seised in fee, to his wife for life, with liberty to sell it, in case a good offer should be made, and to invest the proceeds, in the funds, for her benefit during her life; and he directed that, at his wife's death, the house, if not previously sold, should be sold, (but without saying by whom,) and that the proceeds, together with his personal estate, should be divided amongst the children of his brother and sister; and he appointed his wife his executrix, and requested J. H. F. and R. C., jointly with her, to become the executors and trustees of his will. J. H. F. and the testator's widow, proved the will. R. C. died in the lifetime of J. H. F. and the widow, without having proved it. The widow died 25 years after the testator. Held, that J. H. F. had power to sell the house, and to give a receipt for the purchase-money. *Forbes* v. *Peacock*, 152

2. Testator appointed three persons and their respect heirs and assigns, his executors, and gave to them and to their respective heirs and assigns all his real and personal estates, in trust for the purposes after set forth; and first, that they and their respective heirs and assigns, should sell his real estates; and he empowered them and their respective heirs and assigns, to

convey the estates, and to give receipts for the consideration-money. He then requested the executors of his will to sell his farming stock, furniture, &c., and, out of the moneys so arising and all other portions of his personal estate, he required them and their respective heirs and assigns to pay all his debts, &c. One of the trustees and executors died. The two survivors agreed to sell the real estates. The Court, in a suit for a specific performance of the agreement, rejected the word "respective;" and held that the two surviving trustees and executors, could sell and convey the estates to the purchaser; and that the debts were charged on the proceeds of the real estates, and, consequently, that the receipt-clause was unnecessary. *Jones* v. *Price*, 557

PRACTICE.

1. Plaintiff did not proceed, within the time limited by 11 Geo. 4, and 1 Will. 4, c. 36, Rule 13, to take the bill *pro confesso* against a defendant who was in prison for want of answer. After that time had expired, the defendant filed his answer, and then moved, under the rule, to be discharged, without costs. Held that, as the defendant had not applied to be discharged until after he had disabled the plaintiff, by filing his answer, from proceeding to take the bill *pro confesso*, the case was not within the rule, and therefore, the defendant could not be discharged without paying the costs of his contempt. *Williams* v. *Newton*, 45

2. A *ne exeat* will not be granted unless it is prayed for by the bill. *Sharp* v. *Taylor*, 50

3. A motion to advance a cause, cannot be made without notice to the other party. *Powell* v. *Calloway*, 51

4. On a motion to commit a defendant for a contempt, the defendant undertook to make reparation for the act complained of. Whereupon the master was directed to inquire what reparation the defendant ought to make; and he was ordered to make such reparation accordingly; and to pay, to the plaintiff, the costs of the application and consequent thereon. Held that the report made in obedience to that order, did not require confirmation. *Empringham* v. *Short*, 78

5. New security ordered to be given for costs, the surety having become bankrupt. *Veitch* v. *Irving*, 122

6. The defendant being in contempt for want of appearance, the common injunction was extended to stay trial on a motion made without notice. *Harrison* v. *Dixon*, 123

7. The father of infants, before a petition was presented, by their mother, for access to them, &c., under 2 & 3 Vict. c. 54, went, with them, to reside abroad. The court ordered substituted service of the petition, but, at the hearing, declined to make the order, (although the father had filed affidavits and appeared by counsel,) because the father and infants were resident abroad, and because a suit, by the mother, for restitution of conjugal rights, was pending, which, if successful, would have the same effect as the order prayed. The court will not make the order, where the wife has left her husband without sufficient cause. *Semble*, that the order may be made *ex parte*, if the necessity of the case requires it. *In re Taylor*, 178

8. A defendant in a suit for taking accounts omitted to insert, in his examination, any receipts or payments by him during a certain period; the plaintiff, however, proved receipts by him during that period. The court refused to allow the defendant to bring in a further examination or additional accounts, or to give any evidence of payments in order to discharge himself from those receipts. Pending an inquiry before the master, the court will not interfere with his conduct. The dissatisfied party must wait until the report is made, and then except to it. *Maddeford* v. *Austwick*, 209

9. If officers of a corporation are made co-defendants to a bill for a discovery and an injunction to stay an action brought by the corporation, the injunction will be dissolved on the coming in of the answer of the corporation, although the officers have not answered. *Glascott* v. *Copper Miners' Company*, 314

10. Two decrees had been made for the administration of the estate of A. B. deceased, one in a creditor's suit, and the other in a legatee's suit. A motion by the plaintiff in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, was refused, there being no suggestion of a deficiency of assets. *Plunkett* v. *Lewis*, 379

11. An order was made that a cause should stand over, with liberty to the

plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs. The plaintiff made default, and the defendant obtained an order to dismiss, without notice. Held that the order was regularly obtained. *Dobede* v. *Edwards*, 454

12. If the executors and trustees of a will, file a bill for the purpose of having the rights of the defendants in the residue, ascertained, without either praying that the accounts of the personal estate may be taken, or offering to account for it, but admitting that there is a residue: the court will declare the rights of the defendants in the residue, without directing the accounts of the personal estate to be taken, although the defendants apply, at the hearing, to have the accounts taken. *Blathwayt* v. *Taylor*, 455

13. A legatee's bill did not seek to charge the executors for wilful default, and the decree was made accordingly. Afterwards the plaintiff filed another bill against the same defendants, alleging that during the prosecution of the decree, he had discovered that the executors, in various instances (which he stated) had been guilty of wilful default, and praying that they might be charged accordingly. Held that the latter was a supplemental bill in the nature of a bill of review; and, as it had been filed without leave, the court ordered it to be taken off the file, notwithstanding it was regular so far as it stated the death of one of the defendants to the original bill, and prayed that the suit might be revived against his personal representative: held, also, that it was not necessary for the defendant, on whose behalf the motion was made, to serve his co-defendants, with notice of the motion. *Hodson* v. *Ball*, 456

See Affidavit. Costs, 3. Discovery, 1. Dismissal, 1, 2. Exhibit. Issue. 2. Next Friend. Office-Copies, Preliminary Accounts and Inquiries.

PRELIMINARY ACCOUNTS AND INQUIRIES.

Although an order for preliminary accounts and inquiries has been obtained, in a suit for administering a testator's estate, yet the court will not, on that account, restrain a creditor from suing the executors at law. The order, however, does not prevent the parties from having the cause heard before the master has made his report. *Teague* v. *Richards*, 46

PRESBYTERIANS.

See Dissenters.

PROBATE.

See Copyholds, 2. Proof of Will made Abroad.

PRO CONFESSO.

See Practice, 1.

PROOF OF WILL MADE ABROAD.

A British subject resident in France, made his will and died there, having appointed A. and B., who were resident in France, and C. and D., who were resident in England, his executors. The will was translated into French, and the translation was registered, by A. and B., in the proper court in Paris. A duly authenticated copy of the translation was then procured, and translated into English by a notary public in London; and that translation was proved by C. and D. in the prerogative court. *Bain* v. *Lescher*, 397

PROTECTOR OF A SETTLEMENT.

The court of chancery is not the protector of a settlement, where the tenant for life is a married woman whose husband has been convicted of felony, and the life estate is not settled to her separate use. *In re Wainewright*, 352

See Executory Trust.

R.

RAILWAY COMPANY.

See Costs, 1.

READY MONEY.

See Will, 2.

RECEIPT CLAUSE.

See Power of Sale. Restraint on Alienation.

REDUCTION INTO POSSESSION.

A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other, to a trustee for her, married. The mortgagees having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred. Held, that he had reduced both sums into possession. *Rees* v. *Keith*, 388

REFERENCE.

The court, on an interlocutory application, will direct a reference or issue, to ascertain a fact on which the title of the parties depends. Whether the parties ought to be bound by the finding, at the hearing of the cause: *Qu. Kent* v. *Burgess*, 361

REGISTRY.

See SHIP.

RENT-CHARGE.

See ANNUITY.

REPORT.

On a motion to commit a defendant for a contempt, the defendant undertook to make reparation for the act complained of. Whereupon the master was directed to inquire what reparation the defendant ought to make; and he was ordered to make such reparation accordingly; and to pay, to the plaintiff, the costs of the application and consequent thereon. Held that the report made in obedience to the order, did not require confirmation. *Empringham* v. *Short*, 78

See PRACTICE, 8.

REPUBLICATION.

See WILL, 3.

RESTRAINT ON ALIENATION.

The form commonly used for restraining married women from disposing of their separate property by anticipation, is insufficient for that purpose. The receipt clause ought to declare that the receipts of the married woman, to be given, from time to time, after the income of the property shall have become due, shall be, and that *no other receipts shall be* sufficient discharges to the trustees *Brown* v. *Bamford*, 127

REVOCATION.

Testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another annuity to his wife, to his grandson and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and, thereupon, the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were not duly attested. He then made a fourth, which was duly attested, "revoking several of the dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate of every kind; and, instead of such devise, disposition and bequest thereof, I do give all my freehold, copyhold and personal estate of every kind and wheresoever situate, unto my daughter, for her life; and, after the determination of that estate, unto my grandson *and his heirs in strict entail as in my will directed*." He then directed that his grandson, who was an infant, should not be put in possession of his estates, until he attained thirty-one; and that, in the interval, the rents should be accumulated for the benefit of his grandson and his heirs: "and, *in failure of issue of my said grandson*, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils and gave another annuity to his wife; thereby, in all other respects but what was above mentioned, ratifying and confirming his will and codicils. Held that the grandson took not an estate tail, but only an estate for life in the lands. If lands are devised in trust to be settled on A., and his heirs in strict entail, the lands ought to be settled on A. for life, and on the persons designated as his heirs, in succession. *Graves* v. *Hicks*, 536

SATISFACTION.

Estates were settled on A. for life, remainder to trustees, for 1,000 years, to raise 5,000*l.* for the portions of his daughters and younger sons, and, subject thereto, to A. in fee: provided that, if A., in his lifetime or by his will, should give to any of his children entitled to portions under the trusts of the term, any sum of money, &c., for or towards their advancement in marriage or otherwise, the same should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child; unless A. should, by writing under his hand, declare to the contrary. A. had eight daughters and two younger sons. By his will, after reciting the limitations and trusts of the settlement, he devised the estates, subject to the 5,000*l.*, to trustees in trust, by sale or mortgage, to raise money to supply the deficiency of his personal estate for payment of his debts and legacies, and, in the next place, to pay 2,000*l.* to each of his younger sons; and he declared that, after payment of his debts and legacies, and the sums of 2,000*l.*, the estates, or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made, by the trustees, in pursuance of the power thereinbefore given to them for that purpose,) should go to his eldest son. Held that the will did not contain anything that was equivalent to a declaration that the legacies of 2,000*l.* should not be a satisfaction for the portions of the two younger sons, and, consequently, that they were not entitled to their legacies, and also to their shares of the 5,000*l.* *Papillon* v. *Papillon*, 642

SEPARATE PROPERTY.

The form commonly used for restraining married women from disposing of their separate property by anticipation, is insufficient for that purpose. The receipt clause ought to declare that the receipts of the married woman, to be given from time to time, after the income of the property shall have become due, shall be, and that *no other receipts shall be* sufficient discharges to the trustees. *Brown* v. *Bamford*, 127

SET-OFF.

See SHIP.

SETTLEMENT.

1. By a marriage settlement, sums of stock, the wife's property, were settled in trust for the husband during the joint lives of himself and his wife; with remainder to the survivor for life; and it was declared that, if the husband should survive and marry again, and there should be issue of the marriage then living, his life interest in a moiety of the funds should cease, and that moiety should *be transferred to the same persons, and be applied to the like purposes, and in the like manner*, as it would be transferable and applicable to *if the husband were dead.* Then followed trusts of the funds for the children as the husband and wife should jointly appoint, and as the survivor should appoint; and, in default of any appointment, for all the children, (*except an eldest or only son, who, for the time being, should become entitled, in possession or remainder, to the husband's real estates*, under a deed of even date,) the shares to be vested in the children at the usual periods, *but not to be transferred until the death of the surviving parent.* And it was declared that, *after the death of both parents*, the trustees should apply so much as they should think fit, of the income of each child's share, until its share should become transferable, for its maintenance, and should accumulate the surplus: and the trustees were empowered, after the death of both parents, to advance the children, out of the capital of their shares, notwithstanding they should be under 21. The wife died. There was issue of the marriage, four sons and three daughters, all infants. The husband appointed part of the funds to his eldest son, and then married again. The court refused to direct (without a reference as to the husband's ability) the income of the moiety of the funds which the husband forfeited by marrying again, to be applied for the children's maintenance, there being, in consequence of the exception of an eldest or only son, &c., a suspension of the trust for the benefit of the children, during the father's lifetime. *Eskewich* v. *Langston*, 291

2. A. married a female ward of court without consent of the court, and had been guilty of great contumacy in other respects. The court directed the ward's fortune to be settled so as to exclude A., as far as possible, from taking any interest in it. *Kent* v. *Burgess*, 361

3. A married woman who had left her husband and was living separate from him, but not in a state of adultery, held to

be entitled to a settlement out of a sum of stock, to which her husband had become entitled in her right. *Eedes* v. *Eedes*, 569

See EXECUTORY TRUST.

SHIFTING CLAUSE.

See APPOINTMENT, 2.

SHIP.

1. A ship at sea, was mortgaged by the owner to the plaintiff. The ship having become unseaworthy, was condemned and sold in a foreign port. The purchaser drew, upon a person in England, a bill of exchange for the proceeds, and indorsed and delivered it to the captain. The captain claimed a lien upon, or a right of set-off against the amount of the bill, for disbursements which he had made on account of the ship, and threatened to bring an action, against the acceptor, for the money due on the bill. The court granted an injunction to restrain the action. *Lister* v. *Payn*, 348

2. A mortgage of a ship is good as between the mortgagor and mortgagee, although the particulars of the mortgage are not indorsed on the certificate of registry, as required by 3 & 4 Will. 4, c. 55. *id*

SIGNATURE.

J. R. Bridges, having five freehold houses, but no other property, in Cable street, Liverpool, agreed to sell them to J. Bleakley for 248*l*; and, thereupon, drew up the following memorandum in his own handwriting; "July 26th, 1839. —John Bleakley agrees with J. R. Bridges, to take the property in Cable street, for the net sum of 248*l*. 10*s*." Held that the agreement was sufficiently signed by the vendor. *Bleakley* v. *Smith*, 150

SPECIFIC PERFORMANCE.

See COSTS, 1. POWER OF SALE, 2.

STATUTES.

11 Geo. 4, and 1 Will. 4, c. 36.

See CONTEMPT.

11 Geo. 4, and 1 Will. 4, c. 60.

See INFANT, 1.

3 & 4 Will. 4, c. 42.

See INTERPLEADER, 2.

3 & 4 Will. 4, c. 55.

See CAPTAIN, 2.

3 & 4 Will. 4, c. 74.

See FINES AND RECOVERIES.

1 & 2 Vict. c. 110.

See COSTS, 4.

2 & 3 Vict. c. 54.

See PRACTICE, 7.

STATUTE OF FRAUDS.

See AGREEMENT, 1.

STRICT SETTLEMENT.

See CONSTRUCTION, 12.—EXECUTORY TRUST.

SUPPLEMENTAL ANSWER.

See PRACTICE, 8.

SUPPEMENTAL BILL.

See PARTIES, 2.

SUPPLEMENTAL BILL, IN THE NATURE OF A BILL OF REVIEW.

A legatee's bill did not seek to charge the executors for wilful default, and the decree was made accordingly. Afterwards the plaintiff filed another bill against the same defendants, alleging that during the prosecution of the decree, he had discovered that the executors, in various instances (which he stated) had been guilty of wilful default, and praying that they might be charged accordingly. Held that the latter was a supplemental bill in the nature of a bill of review; and, as it had been filed without leave, the court ordered it to be taken off the file, notwithstanding it was regular so far as it stated the death of one of the defendants to the original bill, and prayed that

the suit might be revived against his personal representative: held, also, that it was not necessary for the defendant, on whose behalf the motion was made, to serve his co-defendants with notice of the motion. *Hodson* v. *Ball*, 456

TENANTS IN COMMON.

See WILL, 7.

TERM.

See WILL, 9.

TESTIMONY.

See BILL TO PERPETUATE.

TITLE.

See EXECUTORY TRUST. POWER OF SALE.

TRADE PREMISES.

See CONVERSION.

TRANSFER OF CAUSE.

A cause set down before the Vice-Chancellor of England, was ordered to be transferred to another branch of the court. Held that the Vice-Chancellor of England had, nevertheless, jurisdiction to hear a petition in the cause, presented before the order of transfer was made. *Hills* v. *Hills*, 571

TRUST.

1. Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support and benefit of his three children and the survivors and survivor of them, in such shares and proportions, and in such manner as they should think most proper and advisable; and, if all the children should die without leaving issue, then that the trust fund should remain vested in two trustees, in trust for the persons thereinafter mentioned. Held that *the whole* income of the residue was given for the children's benefit, and, the trustees having applied only part of it for their benefit, that the surplus devolved, on the survivor's death, to his personal representative. *Beevor* v. *Partridge*, 229

2. A lease of a meeting-house was granted, in trust for a congregation of Protestant dissenters, who then met in a house belonging to J. A., in the town of S. The congregation was then in connection with the Secession Church of Scotland, and, consequently, professed the same doctrines and adopted the same form of worship, government and discipline, as that church. Some years afterwards, the minister and a large majority of the congregation separated from that connection, and joined another religious body, which professed the same doctrines and used the same form of worship, but not the same form of government and discipline, as the Secession Church: they, however, retained possession of the meeting-house. Held, that, on their separation, they ceased to be objects of the trust; and, therefore, were not entitled to keep possession of the meeting-house. *Broom* v. *Summers*, 352

See DEED, 2. NEXT OF KIN. VOLUNTARY DEED.

TRUST FOR SALE.

Testator appointed three persons and their respective heirs and assigns, his executors, and gave to them and to their respective heirs and assigns all his real and personal estates, in trust for the purposes after set forth; and first, that they and their respective heirs and assigns, should sell his real estates; and he empowered them and their respective heirs and assigns, to convey the estates, and to give receipts for the consideration-money. He then requested the executors of his will to sell his farming stock, furniture, &c., and, out of the moneys so arising and all other portions of his personal estate, he required them and their respective heirs and assigns to pay all his debts, &c. One of the trustees and executors died. The two survivors agreed to sell the real estates. The Court, in a suit for a specific performance of the agreement, rejected the word "respective;" and held that the two surviving trustees and executors, could sell and convey the estates to the purchaser; and that the debts were charged on the proceeds of the real estates, and, consequently, that the receipt-clause was unnecessary. *Jones* v. *Price*, 557

See POWER OF SALE, 1.

TRUSTEE.

Four co-partners purchased an estate

out of the partnership assets, and took a conveyance themselves as tenants in common in fee. One of them died intestate as to his real estates, leaving an infant heir. The survivors settled, with his executors, for the value of one-fourth of the estate, and then petitioned, under the 11 Geo. 4, and 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join in conveying the estate to a purchaser. The court refused to make the order, and said that a bill must be filed. *Ex parte Williams*, 54

See LEASEHOLDS.

UNITARIANS.

See DISSENTERS. EXTRINSIC EVIDENCE.

VENDOR AND PURCHASER.

1. A. agreed to sell land to a railway company; but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant. Held, that, although the company were bound, by their Act, to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit and of having the conveyance settled by the Master, must be paid out of the purchase-money. *Midland Counties Railway Company* v. *Westcomb*, 57

2. G., a publican, agreed to sell his public-house (which M. & Co. supplied with beer) to A. A. being unable to pay the whole purchase-money, M. & Co., at his request, agreed to pay to G. 1,000*l.*, part of it. At a meeting of the parties for completing the purchase, M. & Co. paid the 1,000*l.* to G. G. then executed the conveyance of the house, and, *immediately afterwards, delivered it to M. & Co.*; and A. signed a memorandum expressing that he had deposited the deed with M. & Co., for securing, by way of equitable mortgage, the payment to them of the 1,000*l.* Shortly afterwards, M. & Co. discovered that A. was an uncertificated bankrupt. Held, nevertheless, that they had, as against A.'s assignees, a lien on the deed for the 1,000*l.* *Meux* v. *Smith*, 410

See AGREEMENT, 1. LEASEHOLDS. POWER OF SALE, 2.

VIVA VOCE PROOF.

See EXHIBIT.

VOLUNTARY DEED.

A. instituted a suit against B. and C. respecting a sum of 4,000*l.* D. also was made a party to the suit; but having no interest, he disclaimed. A., B. and C. afterwards came to a compromise, in pursuance of which they executed a deed, assigning the 4,000*l.* to trustees, in trust to pay to D. his costs of the suit, and to divide the rest of the fund amongst A., B. and C. D., though he was not a party either to the compromise or the deed, filed a bill against A., B. and C., and the trustees, to compel a performance of the trusts and payment of his costs. A demurrer by C., for want of equity, was allowed. *Gibbs* v. *Glamis*, 584

WARD OF COURT.

A. married a female ward of Court without consent of the Court, and had been guilty of great contumacy in other respects. The Court directed the ward's fortune to be settled so as to exclude A., as far as possible, from taking any interest in it. *Kent* v. *Burgess*, 361

WILFUL DEFAULT.

See PRACTICE, 13.

WILL.

1. Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be, from time to time, a sufficient discharge. Held, that the daughter and her children, living at the testator's death, were entitled to the residue jointly. *De Witte* v. *De Witte*, 41

2. "I give, to my wife, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease." Held, that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a

house, and the interest of a sum due on mortgage, did not pass. *Fryer* v. *Ranken*, 55

3. Testator, by his will, gave 500*l.* to A. and 1,000*l.* to B., to be paid *within* 12 calendar months after his wife's death. By a codicil of the same date, he reduced those legacies to 300*l.* and 500*l.* respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will, of 500*l.* to A., he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that, by his will, he had given to R. 3,000*l.*, he reduced that legacy to 2,000*l.*; and then directed that the 300*l.* given to A., as well as the 1,000*l.* given to B., should not be paid till twelve months *after* the death of his wife. Held, taking all the instruments together, that B. was entitled to a legacy of 1,000*l.* *Grand* v. *Reeve*, 66

4. Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death; but only one of them survived the annuitant. Held that the capital of the stock which had been provided to answer the annuity, did not vest in the surviving child, on the annuitant's death; but vested, on the testator's death, in all the children then living, as tenants in common. *Watson* v. *Watson*, 73

5. Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes. Held, nevertheless, that they were entitled to only one share, each, of the residue. *Pruen* v. *Osborne*, 132

6. Testator bequeathed his residue to the children, then living, of T. P. and W. C., and the lawful issue then living of such of their children as were dead, as tenants in common, so nevertheless that such issue should, as amongst themselves, take as tenants in common, and *per stirpes* and not *per capita*; it being his intention that such issue should have only the shares which their respective parents would have been entitled to, if living. Held that the word "issue" must be taken in the restricted sense of "children." *id*

7. Testator gave 5,000*l.* to his sons, in trust for his daughter Mrs. W., so as not to be subject to the debts, acts or control of her husband; and he gave the like sum to his daughter, Mrs. A., in trust as aforesaid, for the use of herself and children. Mrs. A. had two children living at the testator's death. Held that they did not take either as joint-tenants or tenants in common with her; but that she was entitled to the whole income of the fund, for her life, for her separate use, with remainder to her children. *French* v. *French*, 257

8. Testator directed his residue to be divided amongst the children of L. D, to wit, J. D., E. D., and A. D. Held that the gift was not made to the children as a class, but as individuals; and that, one of them having died in the testator's lifetime, the share intended for that child was undisposed of. Testator directed that the legacies given, by his will, to females, married or single, should be for their own benefit and their children, and should never be subjected to the control of their respective husbands. Held that the females took for their lives, for their separate use, with remainders to their children. *Bain* v. *Lescher*, 397

9. A testator directed the income of his property to be accumulated for the term of 21 years *from* his death. The testator died on the 5th January, 1820. Held that, in the computation of the term, the day of his death was to be excluded; and, consequently, that the dividends on stock which became due on the 5th January, 1841, were subject to the trust for accumulation. *Gorst* v. *Lowndes*, 434

10. Testator devised his estates to the second son of Edward Weld of Lulworth, Esq., for his life, with remainders to his sons, successively, in tail male, with like remainders to the third and other sons (except the eldest) of the said Edward Weld, and their sons, with remainders to the first and other sons of each brother (except the eldest brother) of the said Edward Weld, successively, in tail male, with remainders to the second and other sons (except the eldest) of Lady Stourton, one of the sisters of the said Edward Weld, successively, in tail male. The will was dated in 1834, and the testator died in 1837. There was not, either at the date of the will or at the testator's death, any such person as Edward Weld, of Lulworth; but it appeared, from evidence as to the state of the Weld family, that Joseph Weld was then the possessor

of Lulworth; that he had an elder brother, named Thomas, and had had another brother, Edward, older than himself, who died a bachelor in 1796; that he had two sons, Edward Joseph, his eldest, and Thomas, his second son; and that Lady Stourton was his sister. The question was, whether the second son of Joseph, or of Edward, or of Edward Joseph, was intended to be the object of the first devise. The court decided in favor of the second son of Joseph. *Blundell* v. *Gladstone*, 467

11. The probate of a will is not a sufficient authentication of it so far as it relates to copyholds. *Archer* v. *Slater*, 507

See HEIR AND EXECUTOR. LEGACIES. LEGACY-DUTY. LUNATIC. PORTIONS. POWER OF SALE, 1, 2. PROOF OF WILL MADE ABROAD. REVOCATION. TRUST, 1.

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